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Volume 24

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 39

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE CEMENT INSTITUTE, et al.

No. 40

FEDERAL TRADE COMMISSION, PETITIONER

vs.

NORTHWESTERN PORTLAND CEMENT COMPANY

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UNITED STATES OF AMERICA.

(Caption—3167)

PETITION, MOTION AND SUPPORTING AFFIDAVIT, OF THE RESPONDENT MARQUETTE CEMENT MANUFACTURING COMPANY, A CORPORATION, TO RECUSE THE FEDERAL TRADE COMMISSION, AS NOW CONSTITUTED, FROM PASSING UPON THE ISSUES IN THE ABOVE ENTITLED CAUSE.

(Received May 5, 1942.)

Now comes the respondent Marquette Cement Manufacturing Company, by its attorneys of record, Edward A. Zimmerman and Harold W. Norman, and respectfully shows that the Federal Trade Commission, as presently constituted, is not a tribunal free from bias and prejudice and duly qualified to hear, try, and pass upon the issues in the above entitled cause and to enter any order in relation thereto, in that the said Commission, prior to consideration of the record, evidence contained in the transcript of the proceedings before the Examiner, the report of the Examiner upon the evidence, the exceptions thereto filed on behalf of this respondent, and the several briefs and arguments of the parties to the cause, prejudged the issues in the said cause and has indicated by various public utterances contained in various publications prior to the filing of the complaint, during the proceedings before the Examiner, and subsequent thereto, such prejudgment of the issues in this cause and prejudice and bias against the Portland cement industry generally and the methods of pricing, marketing and distributing Portland cement used by the producers thereof who are respondents in this case; including the respondent Marquette Cement Manufacturing Company; that it appears therefrom that the respondent Marquette Cement Manufacturing Company and the Portland cement industry generally cannot and will not receive a fair and impartial hearing of the issues in this proceeding before the said Federal Trade Commission as it is now constituted.

WHEREFORE, the said respondent Marquette Cement Manufacturing Company now respectfully petitions the Federal Trade Commission as now constituted, and each and every member thereof, to recuse themselves as mem-

bers of the said Commission from hearing, considering and passing upon the issues in the above entitled cause and from entering any order in relation thereto. In support of the foregoing petition and motion, the respondent Marquette Cement Manufacturing Company, for the purpose of showing such prejudice, bias and prejudgment as aforesaid and for the purpose of showing the import and meaning intended by the Commission to be ascribed to certain terms, such as "what is known as a multiple basing point system of pricing," "governing basing point," "basing point," "base price," and "price" and for no other purpose whatsoever, now presents and offers in evidence, to become a part of the record of the proceedings in the above described cause, certain writings and publications described as follows:

1. Annual Reports of the Federal Trade Commission for all Fiscal years beginning after June 30, 1926 to and including the Fiscal year ended June 30, 1941, copies of which are presented herewith and made a part hereof as Marquette's Exhibits Nos. 1 through 15.

2. Report of the Federal Trade Commission on Price Bases Inquiry, The Basing Point Formula and Cement Prices. March, 1932. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 16.

3. Cement Industry: Senate Document No. 71, 73rd Congress, 1st Session. Report by the Federal Trade Commission to the Senate. June, 1933. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 17.

4. Practices of the Steel Industry Under the Code, Senate Doc. No. 159, being a letter from the Chairman of the Federal Trade Commission transmitting in response to Senate Resolution No. 166a report on the steel industry and the "Code of Fair Competition," relating to that industry dated March 20, 1934, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 18.

5. Report of the Federal Trade Commission to the President with respect to the Basing Point System in the Iron and Steel Industry. November, 1934. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 19.

6. Statements of Honorable R. E. Freer and Hugh E.

White, on behalf of the Federal Trade Commission, at Hearings before the Committee on Interstate Commerce, U. S. Senate 74th Congress, second session on S. 4055 March 9 to April 10, 1936 appearing at pages 309-325 and 389-395 of a transcript of said hearings, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 20.

7. Federal Trade Commission Report to the President on Steel Sheet Piling, dated June 10, 1936, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 21.

8. Press Release of Federal Trade Commission, dated July 5, 1937, on the issuance of the Complaint in the instant proceeding, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 22.

9. Investigation of Concentration of Economic Power, Monograph No. 42. "The Basing Point Problem," printed for the use of the Temporary National Economic Committee, 1941. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 23.

Marquette Cement Manufacturing Company,
By Edward A. Zimmerman,
Harold W. Norman.

United States of America, } ss.
District of Columbia. }

Edward A. Zimmerman, being first duly sworn, deposes:

1. That he is one of the attorneys of record for Marquette Cement Manufacturing Company, one of the producing respondents in the above entitled cause;

2. That he has read the foregoing motion and petition and that he has examined the matter contained in the several publications therein listed and referred to as contained in public utterances, findings, opinions and conclusions made or adopted and published by or for the Federal Trade Commission;

3. That contained therein are numerous charges, conclusions, opinions, innuendoes and other utterances that relate to the alleged use by the Portland cement industry generally through an alleged combination and conspiracy of the several producing respondents in the cause, including Marquette Cement Manufacturing Company, of methods of pricing, marketing and distributing Portland

cement which are referred to by such terms as "what is known as a multiple basing point system of pricing," "basing points," "basing point prices," "basing point formula," "phantom freight," and other epithets used opprobriously and with the purpose, intent and effect of conveying the idea and conclusion that the producing respondents, including the Marquette Cement Manufacturing Company, are using methods of pricing, marketing and distributing Portland cement which are inherently monopolistic and which are used as the result of unlawful combination and agreement contrary to and in violation of the anti-trust laws of the United States;

4. That also contained in the said publications are numerous other statements, conclusions, opinions and innuendoes which are intended to and do convey the idea and conclusion that the said producing respondents, including Marquette Cement Manufacturing Company, have entered into unlawful combination or conspiracy in violation of the anti-trust laws of the United States to eliminate and thus have eliminated competition in price in the Portland cement industry;

5. That also included in the said publications are conclusions, definitions, statements of opinion, innuendoes which are intended to and do lead to the conclusion that the methods of marketing, pricing and distributing Portland cement are the same or substantially the same as methods of pricing, marketing and distributing steel which are described and referred to by terms of opprobrium, such as "Pittsburgh plus." "basing point system," "multiple basing point system," "price fixing," and similar terms, and that such methods of pricing, marketing and distributing have been properly condemned as monopolistic, as unfair methods of competition, and as contrary to and in violation of the anti-trust laws of the United States.

6. Further deponent says that the statements, conclusions, expressions of opinion and innuendoes contained in said publications as hereinbefore described and characterized, demonstrate that the Federal Trade Commission has prejudged the issues in this proceedings before hearing and before considering the testimony and evidence taken before the Examiner, the Examiner's report on the said evidence, the exceptions to the Examiner's report, the briefs and arguments of the parties in the cause, and

that the said Federal Trade Commission is so biased and prejudiced that as it is now constituted it is not a tribunal before which the Portland cement industry generally and the respondent Marquette Cement Manufacturing Company particularly can or will receive a fair and impartial hearing and trial of the issues in this proceeding.

7. Deponent further says that the information concerning the prejudgment, bias and prejudice of the Federal Trade Commission as now constituted did not come to the attention or knowledge of the respondent or its counsel until after the close of the testimony taken before the Examiner in this proceeding. That on, to-wit, March 25, 1941 there came to the attention of the counsel for the respondent Marquette Cement Manufacturing Company, Monograph No. 42, above referred to, and that some time thereafter upon reading the said monograph counsel for the said respondent for the first time conceived the possibility that the members of the Federal Trade Commission had prejudged every issue of fact and law presented by the complaint and the respondent's answer in this proceeding. Whereupon, Counsel for the said respondent, in the exercise of due diligence, made every effort to obtain and examine all of the various publications made by the Federal Trade Commission wherein any reference was made to any investigation of the Portland cement industry. Some of the said publications were not available at any library accessible to the counsel for the said respondent and it was not until about the time when the said respondent's brief was due to be filed that it was possible to assemble and examine substantially all of the said publications; the examination of such publications was not completed at the time of the filing of the respondent Marquette Cement Manufacturing Company's brief in this proceeding, but nevertheless the counsel for the respondent did in the said brief call attention to the apparent prejudgment of the issues by the Federal Trade Commission. (See pages 1 to 5, inclusive, of the brief of the respondent Marquette Cement Manufacturing Company.) That thereafter counsel for the said respondent succeeded in obtaining other publications of the Federal Trade Commission wherein reference was made to the investigation of or the action taken against the Portland Cement industry by the Federal Trade Commission and as a result thereof the matter of the prejudgment, bias and

prejudice of the Federal Trade Commission as now constituted is now brought to the attention of the said Commission within a reasonable time after examination of the several documents hereinbefore referred to.

Edward A. Zimmerman.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 5th day of May, A. D. 1942.

Norman O. Chase,
Notary Public.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—3167) * *

ORDER DENYING PETITION AND MOTION OF RESPONDENT MARQUETTE CEMENT MANUFACTURING COMPANY TO RECUSE THE FEDERAL TRADE COMMISSION.

(Entered July 19, 1943.)

Whereas on May 5, 1942, respondent Marquette Cement Manufacturing Company filed a petition and motion to recuse the Federal Trade Commission from passing on the issues of this case because of alleged bias, prejudice, and prejudgment of such issues, and has alleged therein that said respondent and the industry generally could not receive a fair and impartial hearing before the Commission, and

Whereas the Commission has given the matter special consideration and is now fully advised in the premises,

Now, Therefore, Be It Ordered, that said petition and motion be, and they hereby are, denied.

Among the grounds for the above order of denial are the following:

All the published statements of the Commission which are relied upon by respondent Marquette Cement Manufacturing Company to support its petition and motion to recuse, were made in due course of the Commission's official duties in reporting to Congress and to the President as prescribed by Section 6 of the Act creating the Commission. The two principal statements which relate specifically to the nature and degree of price competition in the cement industry were submitted to the United States Senate, printed, and given wide general circulation several years before complaint herein was issued. Such reports were submitted on March 26, 1932 and June 9, 1933.

Extensive additional investigation was made by the Commission subsequent to publication of the reports last referred to. Thereafter and thereupon the Commission issued its complaint herein on July 2, 1937, alleging, in conformity with its statutory duty, that it then had reason to believe that respondents were maintaining a combination to fix prices in violation of the Federal Trade Commission Act and to discriminate in price in violation of the Robinson-Patman Act. Such formal allegation went far beyond any of the previously published statements relied upon by respondent Marquette as evidence of bias, prejudice, and prejudgment, but was made in strict compliance with a statutory requirement imposed upon the Commission by Congress. The Commission cannot provide the remedial relief contemplated by Section 5 of its organic Act through the procedure prescribed in that Section if its advisory reports to Congress, prescribed by Section 6 of the same Act, are to disqualify it from proceeding under Section 5.

In said published reports submitted to the United States Senate regarding the cement industry, the Commission did not express itself concerning the unlawfulness of the practices alleged in and by the complaint herein. That is the ultimate issue tendered by the complaint and on determination of that issue disposition of this case depends. In making such reports the Commission specifically reserved for subsequent consideration the question whether the facts disclosed in said reports involved any violation

of law. A majority of the present members of the Commission did not take office till after said reports to the Senate had been submitted. Said published statements concerning the nature and degree of price competition in the industry described only a condition of inactive, suspended, or "imperfect competition" without stating that such condition was caused by any combination such as alleged in the complaint. The same economic concept of "imperfect competition" was adopted and employed by respondents themselves through the testimony of economists offered by them in this case as an explanation and defense of the identity of delivered price quotations and rigidity of prices, such as were disclosed by said reports and which were confirmed by the evidence received herein.

Said published statements of the Commission regarding the nature and degree of price competition in the cement industry were well known to respondents, including respondent Marquette, either before formal complaint herein was issued or before testimony was taken in support thereof. Counsel for respondent Marquette participated with counsel for other respondents in the cross-examination of witnesses concerning their collaboration in preparing the reports containing such statements. Respondent Marquette and the other cement producer respondents herein filed answers on the merits to the Commission's complaint and participated actively in contesting the evidence offered in support thereof over a period extending from December 1, 1937 to June 20, 1939. They thereafter offered on their own behalf in opposition to the complaint some 26,000 pages of testimony and some 3,000 exhibits during a period extending from September 5, 1939 to November 29, 1940. Respondent Marquette also during this period offered evidence specially and specifically in its own behalf. The first intimation that the Commission received to the effect that respondent Marquette might challenge its right to hear and determine the case because of alleged bias, prejudice, and prejudgment was contained in the brief of said respondent filed on December 16, 1941, more than a year after the lengthy hearings for the taking of testimony had been concluded. Respondent Marquette did not file its petition and motion to recuse until the day on which it appeared before the Commission through counsel who orally argued its case at length on the merits of testimony taken and offered no argument on his petition and motion

to recuse. This was after final oral argument on behalf of the other respondents had been under way for several days without their raising the question covered by the petition and motion to recuse.

For the foregoing reasons the Commission is constrained to deny the petition and motion to recuse filed by respondent Marquette Cement Manufacturing Company in which it was alleged that neither said respondent nor the industry generally could receive a fair and impartial hearing before the Commission.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * * (Caption—3167) * *

ORDER DENYING MOTION BY CERTAIN RESPONDENTS TO SET ASIDE RULING OF THE TRIAL EXAMINER.

(Entered July 17, 1943.)

Whereas, counsel for The Cement Institute and certain other parties respondent filed on April 7, 1938, a motion to set aside a ruling by the trial examiner admitting into evidence Commission Exhibits 1043-A to 1043-5H, inclusive; and

Whereas, said motion was argued by opposing counsel before the Commission on April 25, 1938, and briefs submitted with respect thereto, and thereafter, on May 10, 1938, said motion was conditionally denied; and

Whereas, said motion having been renewed and the Commission having considered the matter, including performance of the conditions specified in the order of May 10, 1938, and being now fully advised in the premises:

It Is Ordered that said motion be, and the same hereby is, denied.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—3167) * *

ORDER DENYING MOTIONS TO SET ASIDE RULINGS OF THE TRIAL EXAMINER, TO STRIKE EXHIBITS AND TESTIMONY FROM THE RECORD, TO EXCLUDE CERTAIN RESPONDENTS FROM THE EFFECT OF CERTAIN EVIDENCE, AND TO DISMISS TH COMPLAINT IN WHOLE OR IN PART AS TO CERTAIN RESPONDENTS.

(Entered July 17, 1943.)

Whereas, after hearing oral arguments by opposing counsel, the Commission, by several orders entered August 29, 1939, denied in part and granted in part motions made by the respondents in this proceeding, which objections and motions comprised approximately 2500 pages of the record herein and which were variously directed to setting aside rulings of the trial examiner, to striking exhibits and testimony from the record, to excluding certain respondents from the effect of certain evidence, to dismissal of

the complaint in whole or in part as to certain respondents; and

Whereas respondents have, by brief and during the course of oral argument, renewed said motions generally and in part specifically, and the Commission having considered said motions as renewed and being now fully advised in the premises:

It Is Ordered that, except to the extent that the aforesaid motions were granted by orders entered August 29, 1939, said motions as renewed be, and the same hereby are, denied.

By the Commission.

Otis B. Johnson,
(Seal) *Secretary.*

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

(Caption—3167)

ORDER DENYING MOTIONS TO DISMISS THE COMPLAINT.

(Entered July 17, 1943.)

Whereas, on September 5, 1939, each and every respondent herein except Huron Portland Cement Company, which had previously moved to dismiss Count I of the complaint, filed motions to dismiss the complaint in this proceeding; and

Whereas, by orders entered September 12, 1939, said motions to dismiss were denied without prejudice to the right of respondents to renew the same upon final hearing, and said motions having been duly renewed; and

Whereas, the Commission having considered said mo-

tions as renewed and being now fully advised in the premises:

It Is Ordered that the aforesaid motions to dismiss the complaint herein beg, and the same hereby are, denied.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—3167) * *

ORDER DENYING APPEAL FROM RULINGS OF TRIAL EXAMINER ON THE ADMISSION INTO EVIDENCE OF SPECIFIED EXHIBITS PROFFERED BY CERTAIN RESPONDENTS.

(Entered July 17, 1943.)

Whereas, during the course of final argument in this proceeding, counsel for a number of respondents appealed from rulings of the trial examiner denying admission into evidence of certain exhibits marked for identification and proffered by respondents and from rulings striking certain exhibits from the record, said exhibits being listed at pages A-702 to A-718, inclusive, of the transcript of argument dated May 6, 1942; and

Whereas, the Commission having considered said appeal and the facts with respect to the said rulings of the trial examiner and being now fully advised in the premises:

It Is Ordered that said appeal be, and the same hereby is, denied.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commisioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—3167) * *

FINDINGS AS TO THE FACTS AND CONCLUSION.

(Filed July 17, 1943.)

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on July 2, 1937, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act and with discriminations in price in the sale of portland cement in violation of the provisions of Subsection (a) of Section 2 of the said Clayton Act as amended.

After the issuance of the said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint, the answers thereto, testimony and other evidence, report of the trial examiner and the exceptions thereto, briefs in support of and in opposition to the

complaint, and oral arguments by opposing counsel, including a general appeal by counsel for respondents from every adverse ruling of the trial examiner without further specification except as to exhibits offered by respondents but not received in evidence; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts.

Paragraph One: (a) Respondent The Cement Institute (hereinafter frequently referred to as "Institute") is a voluntary unincorporated trade association. It was organized in August 1929 for the promotion of the mutual interests of its members and has functioned through its officers, trustees, committees, divisions, bureaus, and other agents. At the time of the issuance of the complaint in this proceeding, practically all domestic producers of portland cement, including all but one of the corporate respondents herein, were members of the Institute. At various times the Institute has had general offices at 11 East 44th Street, New York, New York, and at 111 West Washington Street, Chicago, Illinois, and divisional offices in those and other cities.

(b) Respondent Smith W. Storey (the individual referred to in the complaint as S. W. Storey) was, at the time of the issuance of the complaint in this proceeding, president of the Institute.

(c) Respondent George H. Reiter (the individual referred to in the complaint as G. H. Reiter) was manager of the Chicago Division of the Institute from February 1930 to December 1930 and from August 1, 1933, to June 1935. On the latter date he became general manager of the Institute, in December 1935 he was also made its secretary, and continued in both positions until April 1937.

(d) The other officers of the Institute at the time of the issuance of the complaint in this proceeding were Frank G. McKelvey, vice president; Blaine S. Smith, vice president; and Charles F. Conn, treasurer; and the trustees of the Institute at that time were Harold M. Scott, John J. Porter, Harry F. Jennings, A. J. Rooney, B. H. Rader, M. C. Monday, C. B. Condon, Chester A. Brooke, William

R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Charles L. Hogan, John B. John, Frank G. McKelvey, V. N. Roadstrum, Blaine S. Smith, Smith W. Storey, and Joseph S. Young.

(e) Respondent Aetna Portland Cement Company (hereinafter frequently referred to as "Aetna") is a corporation organized and existing under the laws of the State of Maine, with its principal place of business in Bay City, Michigan. It is a producer of cement and has its manufacturing plant at Bay City, Michigan. It has another plant at Fenton, Michigan, which has not been operated for some time. It became a member of the Institute in June 1933.

(f) Respondent Alpha Portland Cement Company (hereinafter frequently referred to as "Alpha") is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Easton, Pennsylvania. It is a producer of cement and has two manufacturing plants at Martin's Creek, Pennsylvania; and one plant each at Janesville, New York; Cementon (Catskill), New York; Manheim, West Virginia; La Salle, Illinois; Ironton, Ohio; St. Louis, Missouri; Birmingham, Alabama; and Bellevue, Michigan. The last-named plant has not been operated for some time. It was one of the original members of the Institute and continued as a member until May 1931, when it resigned, and thereafter rejoined the Institute in June 1933. (The articles of association of the Institute require the payment of dues for a period of twelve months following notice of resignation.)

(g) Respondent Arkansas Portland Cement Company (hereinafter frequently referred to as "Arkansas") is a corporation organized and existing under the laws of the State of Arkansas, with its principal place of business in Denver, Colorado. It is a producer of cement and has its manufacturing plant at Okay Junction, Arkansas. It joined the Institute in March 1930, resigned in May 1931, rejoined in June 1933, resigned in February 1936, and rejoined in February 1937.

(h) Respondent Ash Grove Lime & Portland Cement Company (hereinafter frequently referred to as "Ash Grove") is a corporation organized and existing under the laws of the State of Maine, with its principal place of business in Kansas City, Missouri. It is a producer of cement

and has its manufacturing plant at Chanute, Kansas. It joined the Institute in January 1930, resigned in February 1931, and rejoined in June 1933. It has a subsidiary, Ash Grove Lime & Portland Cement Company of Nebraska, with its manufacturing plant at Louisville, Nebraska.

(i) Respondent Beaver Portland Cement Company (hereinafter frequently referred to as "Beaver") is a corporation organized and existing under the laws of the State of Oregon, with its principal place of business in Portland, Oregon. It is a producer of cement and has its manufacturing plant at Gold Hill, Oregon. It became a member of the Institute in June 1933.

(j) Respondent The Bessemer Limestone & Cement Company (hereinafter frequently referred to as "Bessemer") is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. It is a producer of cement and since July 1, 1935, has operated one manufacturing plant at Bessemer (shipping point Walford), Pennsylvania. It joined the Institute in July 1935.

(k) Respondent Calaveras Cement Company (hereinafter frequently referred to as "Calaveras") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California. It is a producer of cement and operates a manufacturing plant at Kentucky House, California. It became a member of the Institute in September 1933.

(l) Respondent California Portland Cement Company (hereinafter frequently referred to as "California") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California. It is a producer of cement and has its manufacturing plant at Colton, California. It became a member of the Institute in June 1933.

(m) Respondent Castalia Portland Cement Company (hereinafter frequently referred to as "Castalia") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. After closing its manufacturing plant at Castalia, Ohio, in 1932 it purchased its supplies of cement from Medusa Portland Cement Company until early in 1938, and that company made shipments of cement pursuant to orders received from Castalia. Respondent is at present in bankruptcy and its affairs are in

the hands of a trustee. It became a member of the Institute in March 1930.

(n) Respondent Colorado Portland Cement Company (hereinafter frequently referred to as "Colorado") is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. It is owned by the Ideal Cement Company and markets cement produced by mills of the latter company located at Portland and Boettcher, Colorado. It became a member of the Institute in June 1933, resigned in February 1936, and withdrew its resignation in February 1937.

(o) Respondent Consolidated Cement Corporation (hereinafter frequently referred to as "Consolidated") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. It is a producer of cement and has manufacturing plants located at Fredonia, Kansas, and Cement City, Michigan. Its plant at Mildred, Kansas, has been dismantled. It became a member of the Institute in January 1930, resigned in December 1930, and rejoined in June 1933.

(p) Respondent Coplay Cement Manufacturing Company (hereinafter frequently referred to as "Coplay") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Coplay, Pennsylvania. It is a producer of cement and its manufacturing plant consists of two units: one at Coplay, Pennsylvania, and the other at Saylor, Pennsylvania. It became a member of the Institute in June 1933.

(q) Respondent Cumberland Portland Cement Company (hereinafter frequently referred to as "Cumberland") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Cowan, Tennessee. It is a producer of cement and its manufacturing plant is located at Cowan. It became a member of the Institute in December 1929.

(r) Respondent Dewey Portland Cement Company (hereinafter frequently referred to as "Dewey") is a corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in Kansas City, Missouri. It is a producer of cement and its manufacturing plants are located at Dewey, Oklahoma, and Linwood (near Davenport), Iowa. It became a

member of the Institute in January 1930, resigned in December 1930, and rejoined in June 1933.

(s) Respondent Diamond Portland Cement Company (hereinafter frequently referred to as "Diamond") is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Middle Branch, Ohio. It is a producer of cement and its manufacturing plant is located at Middle Branch, Ohio. It became a member of the Institute in February 1930, resigned at the end of that year, and rejoined in June 1933.

(t) Respondent Edison Cement Corporation (hereinafter frequently referred to as "Edison") is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in West Orange, New Jersey. It is a producer of cement and its manufacturing plant is located at New Village, New Jersey. It became a member of the Institute in June 1933. Its predecessor corporation, the Edison Portland Cement Company, was a member of the Institute from August 1929 until its assets were taken over by Edison in 1931.

(u) Respondent The Federal Portland Cement Company, Inc., (hereinafter frequently referred to as "Federal") is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Buffalo, New York. It is a producer of cement and its manufacturing plant is located at Buffalo, New York. Prior to about the middle of 1933 the output of Federal was sold for it by the Bessemer Cement Corporation, but since that time Federal has marketed its own output. It became a member of the Institute in January 1934.

(v) Respondent Florida Portland Cement Company (hereinafter frequently referred to as "Florida") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. It is a producer of cement and its manufacturing plant is located at Tampa, Florida. It became a member of the Institute in December 1929, resigned in December 1930, and rejoined in June 1933.

(w) Respondent Georgia Cement & Products Company (hereinafter frequently referred to as "Georgia") is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Atlanta, Georgia. It is a producer of cement and its manufacturing plant is located at Portland, Georgia. It became a member of the Institute in December 1929.

(x) Respondent Giant Portland Cement Company (hereinafter frequently referred to as "Giant") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Philadelphia, Pennsylvania. It is a producer of cement and has two manufacturing plants: one located at Egypt, Pennsylvania, and the other at Lesley, Pennsylvania. It became a member of the Institute in August 1929.

(y) Respondent The Glens Falls Portland Cement Company (hereinafter frequently referred to as "Glens Falls") is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Glens Falls, New York. It is a producer of cement and its manufacturing plant is located at Glens Falls, New York. It became a member of the Institute in August 1929.

(z) Respondent Great Lakes Portland Cement Corporation (hereinafter frequently referred to as "Great Lakes") is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business at Buffalo, New York. It is a producer of cement and the entire output of its manufacturing plant in Buffalo, New York, and its clinker grinding plant at Cleveland, Ohio, is marketed by respondent Lehigh Portland Cement Company, which company owns a controlling interest in Great Lakes. It became a member of the Institute in June 1933.

(2a) Respondent Green Bag Cement Company of Pennsylvania (hereinafter frequently referred to as "Green Bag of Pennsylvania") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It is engaged in marketing the cement produced by its parent corporation, Pittsburgh Coke & Iron Company, in a manufacturing plant located at Neville Island, near Pittsburgh, Pennsylvania. It became a member of the Institute in July 1933.

(b) Respondent Green Bag Cement Company of West Virginia (hereinafter frequently referred to as "Green Bag of West Virginia") is a corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in Kenova, West Virginia. It is a producer of cement and its manufacturing plant is located in Kenova, West Virginia. It became a member of the Institute in June 1933.

(2c) Respondent Hawkeye Portland Cement Company (hereinafter frequently referred to as "Hawkeye") is a corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in Des Moines, Iowa. It is a producer of cement and its manufacturing plant is located at Des Moines, Iowa. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2d) Respondent Hercules Cement Corporation (hereinafter frequently referred to as "Hercules") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. It is a producer of cement and its manufacturing plant is located at Stockertown, Pennsylvania. It became a member of the Institute in August 1929, subsequently resigned, and rejoined in June 1933.

(2e) Respondent Hermitage Portland Cement Company (hereinafter frequently referred to as "Hermitage") is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Nashville, Tennessee. It is a producer of cement and its manufacturing plant is located at Nashville, Tennessee. It became a member of the Institute in December 1929.

(2f) Respondent Huron Portland Cement Company (hereinafter frequently referred to as "Huron") is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in Detroit, Michigan. It is a producer of cement and its principal plant is located at Alpena, Michigan, from which plant auxiliary plants at Muskegon, Saginaw, and Detroit, Michigan; Duluth, Minnesota; Milwaukee and Green Bay, Wisconsin; Toledo and Cleveland, Ohio; and Buffalo and Oswego, New York, are supplied.. It also markets the cement manufactured by the Michigan Alkali Company at Wyandotte, Michigan. It became a member of the Institute in June 1933.

(g) Respondent Idaho Portland Cement Company (hereinafter frequently referred to as "Idaho") is a corporation organized and existing under the laws of the State of Idaho, with its principal place of business in Inkom, Idaho. It is a producer of cement and its manufacturing plant is located at Inkom, Idaho. It became a member of the Institute in January 1934.

(2h) Respondent Lone Star Cement Corporation (hereinafter frequently referred to as "Lone Star") is a corporation organized and existing under the laws of the State of Maine, with its principal place of business in New York, New York. It is the respondent named in the complaint as International Cement Corporation, its name having been changed to Lone Star Cement Corporation in 1936 when its subsidiary companies in the United States were merged into a single corporation. It is a producer of cement and has 10 domestic manufacturing plants which are located as follows: Hudson, New York; Nazareth, Pennsylvania; Norfolk, Virginia; North Birmingham and Spocari, Alabama; New Orleans, Louisiana; Manchester (near Houston), and Harrys (near Dallas), Texas; Limedale, Indiana; and Bonner Springs, Kansas. Lone Star Cement Company of New York, Inc., Lone Star Cement Company of Pennsylvania, Lone Star Cement Company of Virginia, Lone Star Cement Company of Alabama, and Lone Star Cement Company of Louisiana became amembers of the Institute in December 1929, and Lone Star Cement Company of Indiana and Lone Star Cement Company of Kansas became members of the Institute in January 1930. The parent corporation, International Cement Corporation, resigned these memberships in the Institute in October 1930, and in June 1933 all of the Lone Star companies above named rejoined the Institute and the Lone Star Company of Texas also joined.

(2i) Respondent Keystone Portland Cement Company (hereinafter frequently referred to as "Keystone") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. It is a producer of cement and its manufacturing plant is located at Bath, Pennsylvania. It became a member of the Institute in June 1933.

(2j) Respondent Kosmos Portland Cement Company (hereinafter frequently referred to as "Kosmos") is a corporation organized and existing under the laws of the State of Kentucky, with its principal place of business in Kosmosdale, Kentucky. It is a producer of cement and its manufacturing plant is located as Kosmosdale, Kentucky. It became a member of the Institute in June 1933.

(2k) Respondent Lawrence Portland Cement Company (hereinafter frequently referred to as "Lawrence") is a corporation organized and existing under the laws of the

State of Pennsylvania, with its principal place of business in Northampton, Pennsylvania. It is a producer of cement and its manufacturing plants are located at Siegfried, Pennsylvania, and Thomaston, Maine. It became a member of the Institute in June 1933.

(2l) Respondent Lehigh Portland Cement Company (hereinafter frequently referred to as "Lehigh") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Allentown, Pennsylvania. It is a producer of cement and its active manufacturing plants are located at Sandt's Eddy, Ormrod, New Castle, and Fogelsville, Pennsylvania; Buffalo, New York; Union Bridge, Maryland; Mitchell, Indiana; Oglesby, Illinois; Fordwick, Virginia; Boyles (near Birmingham), Alabama; Mason City, Iowa; Iola, Kansas; and Metaline Falls, Washington. It became a member of the Institute in August 1929, resigned in March 1931, and rejoined in June 1933.

(2m) Respondent Marquette Cement Manufacturing Company (hereinafter frequently referred to as "Marquette") is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. It is a producer of cement and its manufacturing plants are located at Oglesby (frequently referred to as La Salle), Illinois, and Cape Girardeau, Missouri. It became a member of the Institute in June 1933.

(2n) Respondent Medusa Portland Cement Company (hereinafter frequently referred to as "Medusa") is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Cleveland, Ohio. It is a producer of cement and its manufacturing plants are located at York and Wampum, Pennsylvania; Bay Bridge and Silica, Ohio; and Dixon, Illinois. Through a wholly owned subsidiary, the Manitowoc Portland Cement Company, it operates another manufacturing plant at Manitowoc, Wisconsin. It has auxiliary plants at Milwaukee, Wisconsin; Chicago, Illinois; and Holland, Michigan. Its plant at Newaygo, Michigan, has not been operated since 1931. It became a member of the Institute in August 1929.

(2o) Respondent Missouri Portland Cement Company (hereinafter frequently referred to as "Missouri") is a corporation organized and existing under the laws of the

State of Missouri, with its principal place of business in St. Louis, Missouri. It is a producer of cement and its manufacturing plants are located at Prospect Hill and Sugar Creek, Missouri. It became a member of the Institute in January 1930.

(2p) Respondent The Monarch Cement Company (hereinafter frequently referred to as "Monarch") is a corporation organized and existing under the laws of the State of Kansas, with its principal place of business in Humboldt, Kansas. It is a producer of cement and its manufacturing plant is located at Humboldt, Kansas. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2q) Respondent Monolith Portland Cement Company (hereinafter frequently referred to as "Monolith Portland") is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Los Angeles, California. It is a producer of cement and its manufacturing plant is located at Monolith, California. It became a member of the Institute in June 1933.

(2r) Respondent Monolith Portland Midwest Company (hereinafter frequently referred to as "Monolith Midwest") is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Los Angeles, California. It is a producer of cement and its manufacturing plant is located at Laramie, Wyoming. It became a member of the Institute in June 1933.

(2s) Respondent National Cement Company (hereinafter frequently referred to as "National") is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Birmingham, Alabama. It is a producer of cement and its manufacturing plant is located at Ragland, Alabama. It became a member of the Institute in December 1929.

(2t) Respondent Nazareth Cement Company (hereinafter frequently referred to as "Nazareth") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Nazareth, Pennsylvania. It is a producer of cement and its manufacturing plant is located at Nazareth, Pennsylvania. It became a member of the Institute in August 1929.

(2u) Respondent Nebraska Cement Company (herein-

after frequently referred to as "Nebraska") is a corporation organized and existing under the laws of the State of Delaware. It was incorporated in December 1936 and succeeded to the business of a Nebraska corporation of the same name. Like its predecessor, the present company is controlled by the Ideal Cement Company and, likewise, it operates a cement manufacturing plant at Superior, Nebraska, owned by the Ideal Cement Company. Nebraska Cement Company (the Nebraska corporation) became a member of the Institute in May 1930, resigned in September 1930, and rejoined in June 1933. The Nebraska Cement Company (the Delaware corporation) succeeded to the Institute membership of its predecessor company.

(2v) Respondent North American Cement Corporation (hereinafter frequently referred to as "North American") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Albany, New York. It is a producer of cement and its manufacturing plants are located at Howe's Cave and Catskill, New York, and Security, Maryland. It became a member of the Institute in June 1933.

(2w) Respondent Northwestern Portland Cement Company (hereinafter frequently referred to as "Northwestern Portland") is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Washington. It is a producer of cement and its manufacturing plant is located at Grotto, Washington. It became a member of the Institute in July 1933.

(2x) Respondent Northwestern States Portland Cement Company (hereinafter frequently referred to as "Northwestern States") is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in Mason City, Iowa. It is a producer of cement and its manufacturing plants are located at Mason City and Gilmore City, Iowa. It has continued the membership in the Institute of its predecessor corporation of the same name, which became a member in January 1930.

(2y) Respondent Oklahoma Portland Cement Company (hereinafter frequently referred to as "Oklahoma") is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Denver, Colorado. It markets the cement produced by Ideal Cement Company at two manufacturing plants at

Ada, Oklahoma. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2z) Respondent Oregon Portland Cement Company (hereinafter frequently referred to as "Oregon") is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Portland, Oregon. It is a producer of cement and its manufacturing plants are located at Lime and Oswego, Oregon. It became a member of the Institute in June 1933.

(3a) Respondent Pacific Portland Cement Company (hereinafter frequently referred to as "Pacific") is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. It is a producer of cement and its manufacturing plant is located at Redwood Harbor, California. Its plant at San Juan Bautista, California, has not been operated for a number of years. It became a member of the Institute in June 1933.

(3b) Respondent Peerless Cement Corporation (hereinafter frequently referred to as "Peerless") is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in Detroit, Michigan. It succeeded in January 1936 to the business of another corporation of the same name which went into receivership and was dissolved. It is a producer of cement and its manufacturing plants are located at Detroit and Port Huron, Michigan. It became a member of the Institute in January 1936 and its predecessor company had previously been a member of the Institute.

(3c) Respondent Pennsylvania-Dixie Cement Corporation (hereinafter frequently referred to as "Penn-Dixie") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. It is a producer of cement and its manufacturing plants are located at Kingsport and Richard City, Tennessee; Clinchfield, Georgia; Nazareth, Pen Allen, and Bath, Pennsylvania; Portland Point, New York; and West Des Moines, Iowa. It became a member of the Institute in August 1929.

(3d) Respondent Petoskey Portland Cement Company (hereinafter frequently referred to as "Petoskey") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in

Petoskey, Michigan. It is a producer of cement and its manufacturing plant is located at Petoskey, Michigan. It became a member of the Institute in January 1930.

(3e) Respondent Pittsburgh Plate Glass Company (hereinafter frequently referred to as "Pittsburgh Plate Glass") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Pittsburgh, Pennsylvania. It is a producer of cement and its manufacturing plant is located at Fultonham, Ohio. It became a member of the Institute in June 1933.

(3f) Respondent Portland Cement Company of Utah (hereinafter frequently referred to as "Portland of Utah") is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business in Salt Lake City, Utah. It is a producer of cement and its manufacturing plant is located in Salt Lake City, Utah. It became a member of the Institute in December 1936.

(3g) Respondent Riverside Cement Company (hereinafter frequently referred to as "Riverside") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Los Angeles, California. It is a producer of cement and its manufacturing plants are located at Crestmore and Oro Grande, California. The latter plant has not been operated since 1928. It became a member of the Institute in June 1933.

(3h) Respondent Santa Cruz Portland Cement Company (hereinafter frequently referred to as "Santa Cruz") is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. It is a producer of cement and its manufacturing plant is located at Davenport, California. It has auxiliary plants at Alameda, Stockton, and Long Beach, California, and Portland, Oregon. It became a member of the Institute in June 1933.

(3i) Respondent Signal Mountain Portland Cement Company (hereinafter frequently referred to as "Signal Mountain") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. It is a producer of cement and its manufacturing plant is located at Chattanooga, Tennessee. It became a member of the Institute in December 1929, resigned in December 1930, and rejoined in June 1933.

(3j) Respondent Southern States Portland Cement Company (hereinafter frequently referred to as "Southern States") is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Rockmart, Georgia. It is a producer of cement and its manufacturing plant is located at Rockmart, Georgia. It became a member of the Institute in December 1929.

(3k) Southwestern Portland Cement Company (hereinafter frequently referred to as "Southwestern") is a corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in El Paso, Texas. It is a producer of cement and its manufacturing plants are located at El Paso, Texas; Victorville, California; and Osborn, Ohio. It became a member of the Institute in January 1930, but paid dues only for its Osborn, Ohio, plant until June 1933, when it began payment of dues for all of its plants.

(3l) Respondent Spokane Portland Cement Company (hereinafter frequently referred to as "Spokane") is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Spokane, Washington. It is a producer of cement and its manufacturing plant is located at Irvin, Washington. This business was originally organized in 1910 as the International Portland Cement Company, Ltd., which, on or about May 2, 1932, by amendment to its articles of incorporation, changed its name to the Spokane Portland Cement Company. With the consent of this company, a new corporation of the identical name was organized about February 5, 1937, and about February 13, 1937, the original Spokane Portland Cement Company, by amendment to its articles of incorporation, changed its name to International Portland Cement Company, Ltd. About May 5, 1937, the present Spokane Portland Cement Company acquired the property and business of the International Portland Cement Company, Ltd., and thereafter the latter company was dissolved. The present Spokane Portland Cement Company retained and employed the same management and personnel previously employed by its predecessor corporation. The original Spokane Portland Cement Company became a member of the Institute in June 1933 and paid dues up to the end of 1936. The present Spokane Portland Cement Company paid dues to the Institute assessed against the original company for January 1937; thereafter paid dues

assessed against the International Portland Cement Company, Ltd., for the months of February, March, and April 1937; thereafter, without formal application for membership, continued to pay dues through September 1937; and on or about March 1, 1938, formally resigned from the Institute.

(3m) Respondent Standard Portland Cement Company (hereinafter frequently referred to as "Standard") is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Painesville, Ohio. It is a producer of cement and its manufacturing plant is located at Painesville, Ohio. It became a member of the Institute in June 1933.

(3n) Respondent Superior Cement Corporation (hereinafter frequently referred to as "Superior") is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Portsmouth, Ohio. It is a producer of cement and its manufacturing plant is located at Superior, Ohio. It was formerly known as the Wellston Iron Furnace Company, but by change of corporate name became the Superior Cement Corporation. It became a member of the Institute in January 1930.

(3o) Respondent Superior Portland Cement, Inc., (hereinafter frequently referred to as "Superior Portland") is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Washington. It is a producer of cement and its manufacturing plant is located at Concrete, Washington. Since 1931 it also has leased and operated the Seattle plant of the Pacific Coast Cement Company. It became a member of the Institute in June 1933.

(3p) Respondent Three Forks Portland Cement Company (hereinafter frequently referred to as "Three Forks") is a corporation organized and existing under the laws of the State of Montana, with its principal place of business in Denver, Colorado. It markets the cement produced by a manufacturing plant located at Trident, Montana, which plant is owned and operated by the Ideal Cement Company. It became a member of the Institute in June 1933.

(3q) Respondent Trinity Portland Cement Company (hereinafter frequently referred to as "Trinity") is a corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in

Chicago, Illinois. It is a producer of cement and its manufacturing plants are located at Dallas, Fort Worth, and Houston, Texas. It became a member of the Institute in June 1933.

(3r) Respondent Union Portland Cement Company (hereinafter frequently referred to as "Union") is a corporation organized and existing under the laws of the State of Utah, with its principal office in Denver, Colorado. It markets the cement produced by a manufacturing plant located at Devils Slide, Utah, which plant is owned and operated by the Ideal Cement Company. It became a member of the Institute in June 1933.

(3s) Respondent Universal Atlas Cement Company (hereinafter frequently referred to as "Universal") is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of the United States Steel Corporation and is a producer of cement, having manufacturing plants located at Buffington, Indiana; Universal and Northampton, Pennsylvania; Duluth, Minnesota; Leeds, Alabama; Hannibal, Missouri; Independence, Kansas, Waco, Texas; and Hudson, New York. It was originally known as Universal Portland Cement Company, having changed to its present name about January 1930, shortly after it acquired the assets of the Atlas Portland Cement Company, which included all of the above-mentioned manufacturing plants except those at Buffington, Indiana; Universal, Pennsylvania; and Duluth, Minnesota. It became a member of the Institute in June 1933.

(3t) Respondent Valley Forge Cement Company (hereinafter frequently referred to as "Valley Forge") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Catasauqua, Pennsylvania. It is a producer of cement and its manufacturing plant is located in West Conshohocken, Pennsylvania. The entire output of this plant is marketed by the Allentown Portland Cement Company for the account of the Valley Forge Cement Company, and all the officers and directors of Valley Forge Cement Company are officers and directors of the Allentown Portland Cement Company. Under date of February 23, 1937, the Institute advised its members that it then represented all members of the cement industry in the United States, with

certain exceptions which did not include Valley Forge Cement Company; and in a list of members compiled shortly thereafter Valley Forge is listed, followed parenthetically by Allentown. Through its sales agent, Allentown Portland Cement Company, which became a member of the Institute in August 1929, Valley Forge was a party to the activities of the Institute.

(3u) Respondent Volunteer Portland Cement Company (hereinafter frequently referred to as "Volunteer") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Knoxville, Tennessee. It is a producer of cement and its manufacturing plant is located at Caswell (near Knoxville), Tennessee. It became a member of the Institute in December, 1929, resigned in December, 1930, and rejoined in June 1933.

(3v) Respondent Vulcanite Portland Cement Company (hereinafter frequently referred to as "Vulcanite") is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Philadelphia, Pennsylvania. Its manufacturing plant at Vulcanite, New Jersey, has not been operated since 1933. Subsequent to the closing of its plant, Vulcanite has marketed cement manufactured for it by respondent Hercules. It became a member of the Institute in August 1929, resigned in December 1930, and rejoined in June 1933.

(3w) Respondent Wabash Portland Cement Company (hereinafter frequently referred to as "Wabash") is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in Detroit, Michigan. It is a producer of cement and its plants are located at Stroh, Indiana, and Osborn, Ohio. It became a member of the Institute in January 1930, resigned in November 1930, and rejoined in June 1933.

(3x) Respondent West Penn Cement Company (hereinafter frequently referred to as "West Penn") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Butler, Pennsylvania. It is a producer of cement and its manufacturing plant is located at West Winfield, Pennsylvania. It became a member of the Institute in August 1929.

(3y) Respondent The Whitehall Cement Manufacturing

Company (hereinafter frequently referred to as "Whitehall") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. It is a producer of cement and its manufacturing plant is located at Northampton, Pennsylvania. It became a member of the Institute in June 1933.

(3z) Respondent Wolverine Portland Cement Company (hereinafter frequently referred to as "Wolverine") is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in Coldwater, Michigan. It is a producer of cement and its manufacturing plants are located at Quincy and Coldwater, Michigan. It became a member of the Institute in June 1933.

(4a) Respondent Yosemite Portland Cement Corporation (hereinafter frequently referred to as "Yosemite") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Merced, California. It is a producer of cement and its manufacturing plant is located at Merced, California. It became a member of the Institute in June 1933.

Paragraph Two: The corporate respondents named in Paragraph One, except as otherwise specifically set forth therein, are engaged in the production, sale, and distribution of portland cement, and in the course thereof each competes with others of said respondents to the extent that competition has not been restrained, lessend, or destroyed as hereinafter set forth. Pursuant to sales made in the course and conduct of its said business, or sales made for it, each such corporate respondent regularly transports cement, or causes it to be transported, from the State in which such cement is produced to purchasers thereof at locations outside the State in which such cement is produced; except that Northwestern Portland makes no sales or shipments outside the State of Washington, Superior Portland, with few exceptions, makes sales and shipments outside the State of Washington only to Alaska, and Florida makes few, if any, sales and shipments outside the State of Florida except to destinations outside the continental United States. In general, said corporate respondents have maintained, and now maintain, a constant course of trade and commerce in cement among and between the several States of the United States. The re-

spondents named in sections (a) to (d), inclusive, of Paragraph One are not individually engaged in the production, sale, or distribution of cement, but have participated in, aided, assisted, and cooperated with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth.

Paragraph Three: (a) Portland cement, technical definitions of which appear in the record, is made of finely ground limestone, shale, or slag, and other material which are heated or "burned" until fused into "clinker," which is then ground into the fine powder usually referred to merely as "cement." The first mill for the commercial manufacture of cement in this country was established in Pennsylvania some 70 years ago. Prior to that time the cement used in this country was imported from abroad. The raw materials and fuel necessary for the production of cement are available in many parts of the United States and its manufacture has gradually spread until there are now cement-producing plants in many States, including Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. There are approximately 80 manufacturers of cement in the United States and the total number of mills operated by them is about 150. Cement is a heavy and bulky commodity and the cost of transporting it from point of manufacture to point of use generally constitutes a substantial part of the delivered cost. Freight charges of 30¢ to 60¢ per barrel for delivery are quite usual, charges approximating $1 per barrel are not uncommon, and in extreme instances the delivery charges sometimes reach amounts such as $1.33, $1.52, and $1.71 per barrel (Com. Exs. 2711-188; 2722-18; and 2671-27). The high transportation cost constitutes one of the factors which have contributed to the extension of the manufacture of cement throughout the United States.

(b) Cement is used in street and highway construction, in water power, irrigation, and flood control works, in most heavy construction work, in general building, in various public projects, in the production of blocks, pipes, and other products, and in many other ways. In some of

these uses cement constitutes a very substantial part of the total cost of all materials used in the project. The aggregate consumption of cement is large, and the total quantity used and the value thereof make it a commodity of material importance in the National economy. Shipments from domestic cement plants during each of the 10 years from 1928 to 1937, inclusive, expressed in terms of barrels to the nearest million were:

Year	Barrels
1928	176,000,000
1929	170,000,000
1930	159,000,000
1931	127,000,000
1932	81,000,000
1933	64,000,000
1934	75,000,000
1935	75,000,000
1936	113,000,000
1937	114,000,000

(Resp Exs. 3772-3781).

(c) Manufacturers customarily market cement by sales to dealers for resale, to processors who sell ready-mixed cement, to manufacturers of cement products such as blocks and pipes, to contractors who use it in construction, to railroads and other large commercial users, and to governmental agencies. In periods of normal business, sales to dealers constitute the most important channel of distribution in terms of volume, but in the years of 1930 to 1937 public construction, undertaken in part at least as a relief measure to alleviate the effects of the economic depression, was on so large a scale as to make governmental purchases an unusually important outlet for cement during those years.

(d) The quantity unit in the cement industry is a barrel of 376 pounds net weight. Cement is usually packaged in paper or cloth bags containing 94 pounds each, and when thus packaged four bags constitute a barrel of cement, the gross weight of which is 380 pounds.

Paragraph Four: (a) Five of the same 80 companies producing cement—Alpha, Lehigh, Lone Star, Penn-Dixie, and Universal—operate 49 out of the approximate total of 150 manufacturing plants. The productive capacity of these five respondents exceeds one-third of the total ca-

pacity of the industry, and their manufacturing plants are so located as to enable one or more of these respondents effectively to reach all parts of the United States except the West Coast in the sale of cement. These respondent and five others control more than one-half of the productive capacity of the industry. These 10 and 16 other respondents account for approximately three-fourths of the total capacity of the industry.

(b) There are substantial interrelationships among a number of the corporate respondents. The Cowham Engineering Company holds stock in, manages, and directs the properties and sales of Florida, Trinity, Signal Mountain, and Consolidated. Great Lakes is controlled by Lehigh and its output marketed by that company. The president of Hermitage is also president of Cumberland. Monolith Portland owns a controlling interest in Monolith Midwest. The president of Medusa was for many years an officer of Petoskey. He resigned as president of Petoskey in 1937 but has continued since that time as a director of that company. All the officers and directors of Valley Forge are officers and directors of the Allentown Portland Cement Company. Bessemer Securities Company controls Federal and has stock-holdings in Bessemer and Peerless. After closing its manufacturing plant in 1932, Castalia secured its supplies of cement from Medusa. Superior Portland leases and operates the Seattle plant of the Pacific Coast Cement Company. After closing its manufacturing plant in 1933, Vulcanite secured its supplies of cement from Hercules. Oklahoma, Three Forks, Union, Nebraska, Colorado, and Arkansas are controlled by the Boettcher interests through the Ideal Cement Company.

(c) The concentration of a large proportion of the industry in the control of relatively few individuals, directly and through the existing relationships among numerous companies, has aided in creating and maintaining unity of purpose among respondents. These factors also afford a basis for leadership in the industry, as well as the economic power to enforce that leadership. At the time this proceeding was commenced, practically all producers of cement were members of the Institute and the industry thus had an effective vehicle for the formulation, expression, and execution of collective plans and purposes.

Paragraph Five: There have been numerous trade organizations and associations in the cement industry over a long period of years. The Association of American Portland Cement Manufacturers was organized in 1902 and grew in size and strength until its membership included substantially all domestic cement manufacturers. In 1916 its name was changed to Portland Cement Association, and it has continued under that name to the present time. Between 1907 and 1911 several members of the Association of American Portland Cement Manufacturers were also members of the Association of Licensed Cement Manufacturers. The Cement Manufacturers Protective Association was organized in 1916 and remained active until shortly before the decision of the Supreme Court in 1924 in the suit brought by the United States against that association and its members (268 U. S. 588). In 1929 The Cement Institute was organized and has continued to the present time. During a period of about 18 months beginning in November 1933, when partial self-government for the cement industry was authorized under the terms of the National Industrial Recovery Act, the Institute was the repository of the authority delegated and through its control of the Code Authority controlled the administration of the Code for the Cement Industry, subject to such limitations as were imposed by the National Recovery Administration. At various times during the life of the organizations named above there were also in existence in the industry other groups or associations of cement producers of a more strictly local or regional nature, such as the Kansas City Cement Bureau. Some of the respondents in this proceeding have been members of and participated in the activities of one or more of each of the groups named above in addition to their activities in the Institute.

Paragraph Six: (a) The records of cooperative activity among cement producers which are available in this proceeding, beginning with the Association of American Portland Cement Manufacturers in 1902 and continuing to the present time, show that the cement industry has evidenced a strong aversion to free competition and that its members have by understandings and agreements, developed and maintained substantial uniformity of action among themselves with respect to practically every marketing procedure which involves price

or other competition. A remarkable continuity of action is also demonstrated. Some of the current practices of the industry, designated by respondents as "customs of the trade," originated in agreements entered into as long as 20 to 30 years ago and have persisted, with the support of collective action, in substantially their original form. Other practices having similar origin have been modified or extended by collective action, as circumstances required, into their current form. Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action.

(b) These long-pursued restraints of competition have contributed to, if not created, the belief now generally held by respondents that free and open competition is impracticable for the cement industry and have fostered among the respondents a philosophy of seeking not to excel others in quality or price or in affording terms of sale that would be more attractive to purchasers. Instances where expression has been given to this desire not to excel but merely to maintain equality—to keep step—follow. On May 17, 1934, John Treanor, then president of Riverside and a trustee of the Institute, in writing to a fellow trustee, stated in part:

The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined. * * * (Com. Ex. 7-B)

In a letter of March 5, 1934, to the editor of the Wall Street Journal, Mr. Treanor stated:

Now it is to the credit of the men responsible for the capital invested in the cement business that, in the face of this peculiar menace, they have been as successful as they have been in avoiding the extreme evils of such a system; that, foreseeing the dismal end-product of unrestrained competition, they have by, forebearance and skill, consciously obtained equilibrium at something above

the level of ruin, even sometimes within the zone of profit. (Com. Ex. 553-3E)

In response to a question as to whether he thought it futile for competitors to try to increase their percentage of the total business available to the whole group, Benjamin F. Affleck, formerly president of Universal, testified in part:

I don't think my opinion as to whether it was futile or not is important. It just is futile. * * * So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out. (T. 34933)

He also testified:

Q. You don't mean to say, though, that you have no purposes of your own to serve in the making of identical delivered prices on the basing point system?

A. Oh, no, I wouldn't deny that at all. On the contrary, I would say that I was committing suicide if I didn't do that, * * * (T. 34947)

In testifying before the Interstate Commerce Committee of the Senate in 1936 concerning a bid to the Government on a large quantity of cement which was identical to a tenth of a cent with the bids of his competitors, the same witness said in part:

And, as I stated before, this would have been a very attractive order for any one of the four bidders, but we did not care to break the market, and probably the others did not. We have to live with this market a long time, and jobs such as this Beverly job will not be with us year after year. (Com. Ex. 2878-I)

and also:

The Chairman: On this extremely large order of 365,000 barrels, the largest order that any of these people probably had for many years, how did they know but that you were going to make a lower price?

Mr. Affleck: They did not know, but they thought we would have sense enough not to break down the market. (Com. Ex. 2878-J)

George H. Reiter, testifying as sales manager of Universal, was asked whether or not he ever bid under the destination price of a competitor calculated upon mill base plus applicable freight rate, and replied:

Well, to the best of my knowledge, no. (T. 4039)

F. M. Coogan, president of Alpha, testified;

Q. You say you quote delivered prices because it enables you to meet competition. Aren't you interested in beating competition, or just in meeting it?

A. I am interested in meeting the lowest price which I find in any given market.

Q. You are not interested in beating the lowest price that any competitor offers?

A. No, sir; I am not. (T. 24340)

A pamphlet issued by Lone Star entitled "Trade Ethics and Marketing Policies," in explaining cement prices, stated in part:

In the second instance, as we cannot get more than our competitor's price, we quote a price which we expect will be identical with that asked by the competitor whose lower freight rate gives his product the advantage at that point. * * * It is equally simple to anticipate the competitor's price at any definite point, just as it is for any competitor to anticipate ours. This usually results in identical quotations being submitted by several manufacturers at a given time and place. (Com. Ex. 1112, pp. 23, 25)

H. C. Koch, vice president of Lone Star, admitted that he testified as a witness in a suit against his company under the Texas antitrust laws:

Q. What is your definition of competition on a price basis?

A. I always construed the word "competition" as matching prices, or in placing yourself in a position to solicit an order on a standardized product on an equality with the other man. (T. 33161)

In a letter dated August 20, 1935, Blaine S. Smith, president of Penn-Dixie, in discussing the uniformity of prices for cement, stated in part:

It is quite true that any deviation from the uniform price structure works in cumulative fashion and cannot be limited to a few isolated cases without doing serious harm. (Com. Ex. 971-21A)

L. J. Capen, vice president of Dewey, testified in part:

Q. In other words, you want your delivered prices to be the same as those of your competitors?

A. We want to meet competition.

Q. And you mean, by meeting competition, having the prices at given destinations the same as your competitors?

A. Yes, sir. (T. 12678)

L. T. Sunderland, president of Ash Grove, testified in part:

Q. Does it mean that you endeavor to make your delivered prices the same as your competitors?

A. We endeavor to meet.

Q. And by meeting them you mean making them the same?

A. Well, we wouldn't want to discredit our product or be charged with being a chiseler by quoting a lower price. (T. 13694)

Under date of December 30, 1935, in replying to a protest by the Department of Highways of the State of Nevada against identical bids, Santa Cruz stated in part:

The prices which we quoted are our regular established prices under the classification of State Highway Departments. It is expected that prices would be uniform, otherwise the company quoting the lowest price would receive all the business and the other companies would be left without any. (Com. Ex. 1212-B)

In writing to the Louisville Cement Company under date of July 5, 1919, protesting price irregularities by that company, Kosmos stated in part:

You also recognize an obligation of what I might call sportsmanship to compete with the companies on their own level. (Com. Ex. 3211-A)

(c) Within the period since the organization of the Institute there have been, of course, instances where cement manufacturers have made concessions in price or terms of sale; from time to time numerous concessions have been made in particular areas; and in the depth of the economic depression in the early 1930's concessions were widespread. These concessions, however, are exceptions to the general practice and policy, which is and has been to maintain continued and regular uniformity in prices and terms and conditions of sale by all manufacturers offering cement at any given location. In conformity with the philosophy of "competition" indicated in this paragraph, cement is customarily sold by respondents upon the basis of service, entertainment to the buyer, and personal relationships, without substantial competition in quality, price, or terms and conditions of sale. Respondent George H. Reiter, testifying before the Interstate Commerce Committee of the Senate in 1936, said:

The Chairman: One of your advertisements states (reading:)

Under the old system there were only as many competitive points as there were mills. Now, every village, town, and city is a point of competition.

No village, town, or city has competition in price or quality at the present time, has it?

Mr. Reiter: Of course, what that advertisement is trying to do is to defend the destination price.

The Chairman: Yes; but, as a matter of fact, no town, or city has competition as to prices or as to quality of cement, has it?

Mr. Reiter: Generally, that is true. (Com. Ex. 2878-T)

Paragraph Seven: (a) Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser. In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of base price plus all-rail freight. Thus, if Mill A has a base price of $1.50 per barrel, its delivered price at each location where it sells cement will be $1.50 per barrel plus the all-rail freight from its mill to the point of delivery, except that when a sale is made for delivery at a location at which the combination of the base price plus all-rail freight from another mill is a lower figure, Mill A uses this lower combination so that its delivered price at such location will be the same as the delivered price of the other mill. At all locations where the base price of Mill A plus freight is the lowest combination, Mill A recovers $1.50 net at the mill, and at locations where the combination of base price plus freight of another mill is lower, Mill A shrinks its mill net sufficiently to equal that price. Under these conditions it is obvious that the highest mill net which can be recovered by Mill A is $1.50 per barrel, and on sales where it has been necessary to shrink its mill net in order to match the delivered price of another mill, its net recovery at the mill is less than $1.50.

(b) Approximately half of the mills operated by the corporate respondents have base prices and are known as base mills. The other mills which have no base prices are

known as non-base mills. The number and identity of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill.

(c) Having no base price, a non-base mill quotes and sells cement at delivered prices determined by the lowest combination of base price plus freight from base mills. The mill net of a non-base mill is therefore highest in its home location and is less at all other locations by the amount of the freight from its mill to the point of delivery to the purchaser.

(d) In addition to basing points at mill locations, there are a limited number of basing points used for pricing purposes at locations where no cement is produced. There are also basing points common to a number of different mills; that is, several mills may be located in an area from which the freight rates to other locations are the same regardless of where within the given area a mill is located.

(e) Respondents have maintained certain arbitrary variations with respect to basing points. A base may be a dual one; that is, have two prices in effect simultaneously, each applicable in different territory. For example, the Ironton base price south of the Virginia-North Carolina line was higher than its base price north of that line. The application of a base price may also be limited to certain territory and the territory thus excluded be controlled by other bases. The limitation of the Wyandotte base to Michigan territory is an example of this type. In the case of certain adjoining bases a consistent price relationship may be maintained between such bases over periods of years. For example, the Alsen (Hudson Valley) base was for years maintained at 10¢ above the Lehigh Valley base.

(f) Various respondents have described their multiple basing-point system in differing language but without difference in substance. Illustrative of these descriptions, Walter S. Wing, vice president and general manager of Penn-Dixie, testified:

Q. Will you explain, Mr. Wing, what it is that determines which base price shall be applicable at a given destination?

A. The one that makes, with the freight rate, the lowest destination cost. (T. 8136)

A. T. Wood, general manager of Green Bag of West Virginia, testified:

Q. In other words, your method of making up delivered prices is to take the base point that you find prevailing and add the freight in the freight rate book?

A. Meeting prices; right. (T. 29867)

F. M. Coogan, president of Alpha, testified:

Q. Mr. Coogan, today how do you determine the delivered prices which you quote?

A. We determine our delivered prices by the use of certain mill base prices plus the freight rates to the particular destination using the lowest combination of mill base and freight rates which we arrive at, at that particular destination.

Q. Does your particular company use basing points in calculating your delivered prices, if so, will you tell us to what extent?

A. We do. We use basing points. We use them almost entirely, in fact, almost entirely. There are some few exceptions where you might have, as has been the case, in the past years, where, in order to meet foreign competition there have been, what I call, "arbitrary prices" in certain sections. You will find that once in a while, in order to meet a local competition, or local competitive situation, there are some prices which are not based on some of the mill basis plus freight rates, but, generally speaking, all of our destination prices today are made up on the bases of mill basis plus freight rates to destination. (T. 23050)

Charles L. Hogan, president of Lone Star, in testifying before the Interstate Commerce Committee of the Senate in 1936, said:

The Chairman: All the members of the Cement Institute use the basing-point system, do they?

Mr. Hogan: Yes.

The Chairman: They all use the basing-point system?

Mr. Hogan: So far as I know. You do not mean that they all have basing prices? They do not have.

The Chairman: How is that?

Mr. Hogan: They do not all have basing prices. (Com. Ex. 2878-M)

Respondent George H. Reiter testified:

A. The Government destination cost would be the lowest sum of any price base plus the applicable lowest rate

available to the Government, whether land grant, special or commercial.

Q. And I wanted to extend that into the commercial purchases, and have you state to what extent the same principles applied there.

A. Ordinarily the destination price—let me say the commercial destination price—is the lowest sum of any base price plus the applicable commercial freight rate. (T. 3749)

(g) The following is a hypothetical illustration of the system of pricing described: Assume that the base price of Mill A, located at Town A, is $1.50 per barrel; that the base price of Mill C, located at Town G, is the same; that Mill B, located at Town D, is a non-base mill; and that the all-rail freight rates are as indicated. Then the delivered prices of cement in the several towns and the mill nets of the several mills would be as shown below:

	Town A	Town B	Town C	Town D	Town E	Town F	Town G
Freight from Mill A	0	$0.10	$0.20	$0.30	$0.40	$0.50	$0.60
Freight from Mill B	$0.30	$0.20	$0.10	0	$0.10	$0.20	$0.30
Freight from Mill C	$0.60	$0.50	$0.40	$0.30	$0.20	$0.10	0
Delivered price of Mill A	$1.50	$1.60	$1.70	$1.80	$1.70	$1.60	$1.50
Delivered price of Mill B	$1.50	$1.60	$1.70	$1.80	$1.70	$1.60	$1.50
Delivered price of Mill C	$1.50	$1.60	$1.70	$1.80	$1.70	$1.60	$1.50
Mill net of Mill A	$1.50	$1.50	$1.50	$1.50	$1.30	$1.10	$0.90
Mill net of Mill B	$1.20	$1.40	$1.60	$1.80	$1.60	$1.40	$1.20
Mill net of Mill C	$0.90	$1.10	$1.30	$1.50	$1.50	$1.50	$1.50

(h) Excluding errors made in the application of this pricing formula, it is plain that it will inevitably result in identical delivered prices for cement at any given location by all sellers using it. It is equally plain that this formula, once put into operation, is self-perpetuating in the sense that renewed understandings or agreements are not needed to maintain identical delivered prices over an indefinite period of time. This formula was not evolved and put into operation at one stroke. It came into existence and

its territorial application was extended from time to time as a result of understandings and agreements among cement manufacturers. Prior to the organization of the Association of American Portland Cement Manufacturers in 1902, cement was sold f.o.b. mill. In testifying before the Interstate Commerce Committee of the Senate in 1936, B. F. Affleck, president of Universal, said:

In 1901 the Atlas Portland Cement Co., which had built and was operating one of the first plants built in the Lehigh Valley, began to build a large plant at Hannibal, Mo., on the Mississippi River, 100 miles north of St. Louis. The purpose was to better serve the Western territory and to make more profit.

The company then announced it would name all prices delivered instead of f.o.b. mill, and for a time these prices were based on Lehigh Valley base plus freight, the difference between freight from Lehigh Valley and from Hannibal going to increase profits of the Hannibal plant, the customers paying no more than before but getting better service. (Com. Ex. 2878-K)

F. M. Coogan, president of Alpha, testified that after 1902 his company, which had formerly sold cement f.o.b. mill, began selling on a delivered-price basis but for a few years continued making a limited number of sales f.o.b. mill. At about this period the domestic cement manufacturing industry was spreading rapidly from its birthplace in the Lehigh Valley. The increasing number of mills at new locations frequently resulted in purchasers buying f.o.b. mill from the nearest mill rather than from a more distant mill. The existence of delivered-price selling and f.o.b. mill selling side by side had an unsettling effect upon prices.

(i) Some of the background of the concert of action among cement manufacturers with respect to prices during this period of time, and out of which the multiple basing-point delivered-price system evolved, is indicated in the following extracts from the minutes of various meetings of the Association of American Portland Cement Manufacturers. Numbers of the respondents in this proceeding were members of that association, and representatives of some of them were present at each of the meetings from the minutes of which extracts are quoted. At a meeting of the association in December 1904, it was announced that the membership of the association then represented approximately 90 percent of the productive capacity in the

United States. The minutes of this meeting show the following statement by one of the members:

The main grievance which the Association has here today is the grievance for a uniform price for cement. I feel that I can safely state that two-thirds of those present today are ready to adopt any proceedings that will advance and keep the price of cement where it should be, and if there is any member here who has the ability to present to the Executive Committee something that will accomplish this, I assure them that the Executive Committee will do all in their power to put it in force. Now it is in your hands—not in the hands of the Executive Committee—and I agree with you, and will sustain any motion that will advance the price of Portland cement for the year. (Com. Ex. 3235-U)

At this meeting a representative of Nazareth stated:

Now if we are going to accomplish anything in the matter of prices, I believe the right place to do it is here. If we are men enough to get together, and if we can trust each other here in this room, we can have our Executive Committee appoint a few among themselves to get together and feel the market, and say what the market price should be; what they estimate the price should be, and then send out circulars to the different members of this Association on that line. (Com. Ex. 3235-V)

A representative of Coplay then said:

While we are on this subject today we ought to do something practical; according to our By-Laws, we are here for mutual benefit and not for mutual admiration, and I think we can pass a resolution that will be a basis to steady the market for next year. I do not think it is fair that dealers and consumers are enabled to speculate with our goods. It is not fair to our stockholders to have this condition of things. If there is any speculating to be done with our goods, our stockholders should have this privilege—not dealers. I am sure that if we pass a resolution here, fixing the price say to April first deliveries, then increase price for deliveries after that time, and agree right here to do this, that we can carry this through. This is the time and place that this should be done. (Com. Ex. 3235-V)

After discussion, the following resolution was adopted:

Resolved, That the members of this Association in answering inquiries for prices, confine deliveries up to

April 1st, 1905, and quote a higher price for deliveries after that date, and that it is the sense of this meeting that the price should not be less than $1.00 per barrel at the mill for the Lehigh District. (Com. Ex. 3235-W)

At an association meeting in Philadelphia in April 1905, a representative of Lehigh made the statement:

You take the Western situation; the remark was made last evening that, likely, Western prices would reach the Lehigh Valley level, and I think that probably that will be the case east of the Mississippi. Our Michigan friends are interested in that proposition, because the West cannot produce sufficient cement for the business that will come up this year in the West. That will tend to bring on shipments from the Lehigh Valley, and will bring the prices out in the Middle West (east of the Mississippi) up to the Lehigh Valley level. I think it would be very interesting to hear from some of our Michigan members. In view of the fact that none of us have a very large stock of cement on hand, it does seem to me that we have good reason to congratulate ourselves on the satisfactory condition of the cement business today. (Com. Ex. 3235-X)

This was followed by a statement by a member from Michigan, who concluded:

We are trying to follow our Eastern friends in the Lehigh Valley, and we will be very well satisfied if they keep up their "nerve." (Com. Ex. 3235-Y)

Another member from Michigan stated:

We have lately issued a schedule of prices on a basis of 85 cents in the Lehigh Valley, adding freight, and this price we can get without any trouble. This is all very encouraging. (Com. Ex. 3235-Y)

At the same meeting one of the members, Mr. Miller, said in part:

It strikes me that you should appoint a special committee to take charge of the matter of prices and business methods and to report at the next meeting of the Association. Let the committee take the Lehigh Valley for the ground to work upon; no doubt they represent the largest amount of cement manufactured. It seems to me that it would be well if you would appoint a committee, with the majority coming from the Lehigh Valley, to take this matter in hand, formulate some plan, and get together

and have a report for the next meeting at Atlantic City, establishing a uniform method. (Com. Ex. 3235-Z1)

Thereafter, the proposal for the appointment of such a committee was carried by unanimous vote and Mr. Miller was named as chairman thereof. It appears from the minutes of a meeting of the association in September 1905 that:

The president: Mr. Miller made his report to the Atlantic City meeting, which report was adopted at that meeting. That report is now here, together with a list of the members who have signed the same, together with those who have refused to sign. Forty-six members have signed the report, and three, the Atlas, Pacific and Standard Portland Cement Companies, have refused, the latter two being California companies and the other an Eastern company. (Com. Ex. 3235-Z3)

The record does not contain the terms of the agreement signed as indicated in the above quotation. The minutes of a meeting in September 1906 show a report was made by Mr. Miller, as chairman of the committee on trade conditions, which stated in part:

Having passed through both the demoralizing and unbusinesslike methods of one year ago, and now experiencing and enjoying the very opposite, viz. a very healthy condition of our trade, there should be no question which method should govern the management of our business in the future. It may be well, however, at this time to caution the members of our Association not to permit the present favorable conditions to lead them into a false position by adopting more stringent and uncalled-for methods, or unreasonably high prices, and thereby create the false impression that a Trust has secured control of our common industry. (Com. Ex. 3235-Z11)

The minutes of a meeting of the association in September 1908 show a letter to the president of the association from Mr. Miller, chairman of the committee on trade conditions, expressing regret that he was unable to be present and stating in part:

I think it fair to assume that the concensus of opinion of the Association is that the lack of unity and co-operation on the part of all the manufacturers in their respective territories is the only lucid explanation of the unwarranted and unfortunate condition which our business has drifted into. (Com. Ex. 3235-Z35)

He then proceeded to make a number of recommendations, including the following:

All prices quoted for Portland Cement shall be the prices for delivery at the point required by the purchaser. (Com. Ex. 3235-Z36)

(j) In 1900 two employees of the Atlas Portland Cement Company, Messrs. Hurry and Seaman, secured a patent on a method of burning powdered coal in rotary cement kilns. In 1903 the Atlas Portland Cement Company brought suit for infringement of this patent and final argument was had in July 1906. Before a decision was handed down, a settlement was effected and in November 1906 a new corporation known as the North American Portland Cement Company was created, the capital stock of which was owned by Atlas Portland Cement Company, Lehigh, Alpha, American Cement Company, Vulcanite, and Lawrence. The new company was granted an exclusive license, with power to sublicense the use of the Hurry and Seaman patent. In December 1907 the Association of Licensed Cement Manufacturers was formed and, pursuant to the terms of an agreement, various companies were licensed under the patent. A supplemental license agreement was entered into on January 13, 1909, to which Atlas Portland Cement Company, Lehigh, Alpha, American Cement Company, Vulcanite, Lawrence, Pennsylvania Cement Company, Penn-Allen Portland Cement Company, Nazareth, Catskill Cement Company, Bath Portland Cement Company, Glens Falls, Phoenix Cement Company, Edison, Whitehall, and Northampton Portland Cement companies were parties. The agreement provided that other portland cement companies which might thereafter be licensed under the patents might also become parties to it. By this agreement the licensees were made subject to compliance with numerous conditions, including:

All prices quoted for Portland cement covered by the (* * *) License Agreement of which this schedule is part made by any of the parties to said License Agreement shall be prices for delivery at the point required by the purchaser. * * * (Com. Ex. 3196-2R)

and, further:

Until the Licensor shall give notice of establishment of delivery points and sections and minimum prices therein, prices in Territory A shall be as follows:

All prices given below are the minimum prices to con-

sumers and subject to the discounts permitted to dealers and distributors by Paragraph (2) of this Schedule and no other discount.

All prices shall be quoted and made delivered.

Delivered prices for wood and cotton shall be the same and for paper 25 cents less, computing the freight at a weight of 400 lbs. for all packages.

Prices in Territory A shall be not less than $1.20 in wood and cotton and 95 cents in paper plus the Northampton all-rail rate with the following exceptions: * * *. (Com. Ex. 3196-2Y)

After a decision in 1910 adverse to the validity of the Hurry and Seaman patents, the licensing agreement was cancelled on January 1, 1911.

(k) The extension of the price system under discussion to the Michigan area is indicated in the minutes of a meeting of the Association of American Portland Cement Manufacturers in June 1910 at which representatives of a number of the respondents herein were present. A member representing Wabash stated:

The situation in Michigan is very satisfactory and growing more so. There was a chaotic state there early in the year. There was no unity of action at all among the mills until they formed a little association which comprises all the Michigan mills and one or two across the border. This has resulted in a free interchange of views and an understanding to the effect that the Lehigh prices should govern the prices out here. This understanding has been observed. The price today, based upon the Lehigh price of 80 cents, makes Detroit a price of $1.25 delivered. (Com. Ex. 3235-Z59)

(l) The extension of the basing-point system of pricing into the West, as well as the fact that this extension was not the result of independent action, is shown in a letter of January 25, 1915, from the general sales manager of Colorado to Three Forks, an affiliated company, in which it was stated in part:

From this date, our prices will be made f.o.b. point of delivery and the price including cost of sacks. The same to be due 30 days from date of invoice, and an allowance of 2¢ per bbl. will be made for cash received within ten days from date of invoice.

Price to Apply Until Further Notice.

Use Irvin, Wash., as your basing point, and figure $1.50 per bbl., including cost of cloth sacks, f.o.b. that point. Add to this the amount of freight from Irvin to point of destination at rates shown in list sent you by our Chicago friends, which you have no doubt received prior to this date. * * * No deviation or exception to the above price will be considered in any instance, and any salesmen, or employee, deviating one iota, will be discharged at once. No excuse will be tolerated, and if we do not have salesmen at this time who can secure the business for us on the basis of prices given them, we will have to get salesmen who can. We will give every salesman, and every employee, every assistance possible and complete information, so that they may be thoroughly posted, and we will see that our prices are as low as our legitimate competitors are naming, but no lower if we know it, and on this basis we expect them to secure for us practically all of the business in our territory.

I will write you under personal cover, an explanation of the above sometime, in detail, so that you may know exactly why we are so positive in our statements, but can assure you, that every one of them are iron-clad. In this you may know, I will refer to my recent visit to Chicago. (Com. Ex. 3210-A, B, C)

This was followed by letter of January 28, 1915, between the same parties, in which it was stated in part:

I have wired you the basis for quoting all of your territory, which is as follows:

$1.50 per bbl. f.o.b. Irvin.
$1.30 per bbl. f.o.b. LaSalle.
$1.50 per bbl. f.o.b. Mason City.
$1.10 per bbl. f.o.b. Iola.
Whichever figures lowest.

* * * * *

You have no doubt received lists of rates from Irvin, and I am preparing rates from all other basing points, which I hope to have entirely completed within the next few days. However, you, no doubt, have the correct rates in your office at this time. We want no business on any other terms, or prices, than the above, but want you and your salesmen to keep us thoroughly posted in every in-

stance where you have any idea of any deviation from the above by our competitors. You need have no fear, whatever, of the Lehigh people taking any business except on this basis, as their Chicago office is now in complete charge of their Spokane factory, and will be responsible for every action of every one of their employes, and you may rest assured, that Mr. Brown, as well as all the others, understands this perfectly. Mr. Gowan gave me his personal guarantee of this, and I in turn gave him my guarantee of our strict adherence to this. Of course, nothing has been said to the International people regarding this, as, in the first place, I have had no opportunity, and, in the second place, our Chicago friends seem very certain, that the International people would not quote lower than that basis, as they claimed, that the cost at Irvin is fully if not more than $1.10.

What do you think of the advisability of seeing Mr. Berry regarding this matter? Of course, we want to work with them and will do nothing, whatever, against them, but we must realize that the Lehigh plant is our strongest competitor, and we must work in harmony with them and keep absolutely in the clear, keeping our business open and above board in every particular. I have not heard definitely whether Mr. Berry will remain this year with the International Company, but I believe from what information I have, that he will. You remember he stated to me, as no doubt he stated to you, that he would not go lower than any basis upon which he knew the Lehigh plant to be selling, which I hope is true. While on this subject I want to call your attention to the fact of not letting any one know, that any understanding, whatsoever, has been agreed upon, and especially never mention this to any of your customers, but simply say to them, that we have reasons to believe, that no lower prices will be named than those we are quoting, because we know the basis to be practically cost of manufacture, at basing points, and no exceedingly large profit can be made by the plants operating at those basing points. Please caution your salesmen particularly in this regard. (Com. Ex. 3209-A, B)

The mill at Irvin, Washington, referred to in the correspondence quoted was not the property of either Lehigh or Colorado; it belonged to International Portland Cement Company, Limited, the corporate predecessor of Spokane.

(m) The record does not definitely show the date and manner of the extension of the multiple basing-point delivered-price system to California, but it was in existence there at the time the War Industries Board fixed maximum prices for cement during the first World War. The central California mills used the Davenport mill of Santa Cruz as a basing point until about the middle of 1929, when all mills in that area became basing points. In southern California the basing-point system of pricing is modified by an elaborate system of zone prices applicable in certain areas. The system as used in California does not require separate calculations to determine the delivered price in each transaction. The limited number of points at which sales are made makes it possible for each respondent to publish, and each has published, complete price lists showing the delivered prices at substantially all delivery points.

(n) The multiple basing-point delivered-price system was extended to western Washington in 1931. Its introduction there followed a price war which commenced when two new mills began operating in that territory, one in 1928 and the other in 1929, and was approximately coincident with the leasing of one of these new mills by Superior Portland.

(o) When the Institute was organized in August 1929, the statement of purposes contained in the articles of association included these provisions:

To adopt and promulgate a Code of Ethics for the government of the members.

To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable. (Com. Ex. 138-C)

The multiple basing-point delivered-price system was one of the "customs and usages" to be maintained. The Code of Ethics adopted by the Institute, which remained in effect until the beginning of the NRA Code period, included the following:

For manufacturers to divert, or permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is

discriminatory as between purchasers or users, and is therefore an unfair trade practice. (Com. Ex. 138-S)

The diversions thus prohibited would not have been inconsistent with f.o.b. mill selling, but would tend to break down a multiple basing-point delivered-price system. This Code of Ethics also provided:

It is further declared, that it is desirable that a standard form of sales contract be drafted and adopted for the use of the Portland Cement industry. (Com. Ex. 138-Q)

Pursuant to the last-quoted provision of the Code of Ethics, the Institute on July 14, 1930, submitted a report to its members, stating in part:

It represents a statement of the recommendations of the Institute as to the provisions which should be included in a proper contract for the sale of cement as declared in Article II of the Code of Ethics, quoted above. (Com. Ex. 153-M)

Among the recommendations thus made was the following:

Price and Quantity. A definite agreement to sell and to buy a specific number of barrels of portland cement at a definite price or prices F. O. B. a specific destination or destinations, subject to terms and conditions as outlined. * * * (Com. Ex. 153-M)

(p) At the time the National Industrial Recovery Act was approved, the multiple basing-point system of delivered prices was in effect in the cement industry throughout the United States, except in certain limited zones or areas where special prices were in effect. Thus one of the so-called "customs and usages" which the Institute was organized to maintain had been effectively supported and maintained. When the cement industry sought approval of a "Code of Fair Competition" under the NRA, the Institute was the vehicle for submitting a proposed code, and in doing so stated in part:

The Institute includes 96 percent in number and 98 percent of the producing capacity of all Portland Cement producers in the United States, and is authorized to represent the industry under the National Industrial Recovery Act, the policy and purposes of which are set out in Section 1, Title 1, thereof. (Com. Ex. 556, p. 1)

One of the provisions of the suggested code as proposed by the Institute read as follows:

Except in cases where the Committee permits otherwise,

all cement quotations and sales shall be F.O.B. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold F.O.B. plant, in the event land-grant rates may be availed of by the Federal Government in arriving at the delivered cost. (Com. Ex. 556, p. 6)

While the proposed code was pending, Charles F. Conn, president of the Institute, on August 31, 1933, wrote to L. T. Sunderland, president of Ash Grove, and Joseph S. Young, president of Lehigh, saying that it was important that preparation should be made in advance to reply to criticisms and objections which might be offered, and continued:

We [Washington contact committee] therefore request that you gentlemen give consideration to the provisions in the Code and in the supplements thereto, relating to price control (including defense of the present level of prices) and the universal practice of quoting delivered prices only, so that you may be prepared to make a brief statement in support of any phase of this subject, if called upon to do so. (Com. Ex. 836-2V)

There was objection within the National Recovery Administration to the pricing system in use in the cement industry, and the Institute made special efforts to convince the Consumers Advisory Board of NRA that this system was not objectionable. When approved on November 27, 1933, the Code for the Cement Industry did not contain the provision concerning sales f.o.b. point of delivery which had been submitted by the Institute in its proposed code. However, Exhibit C, annexed to the Code as approved, is described as "Form of Future Specific Sales Contract" and reads in part:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified. (Com. Ex. 557)

The Code for the Cement Industry as amended and approved on May 11, 1935, contained the following:

To prevent diversions of cement prohibited by this Code and to insure the broadest field of active competition for all cement business offered, cement shall not be quoted or sold in quantities or for points of delivery which are not definitely specified. (Com. Ex. 560, p. 20)

and

All future sales orders and future sales contracts for the sale of products of the Industry shall contain a definite statement of price, quantities, terms of payment, time and place of delivery, and all other terms of sale necessary to form a complete and unambiguous contract. (Com. Ex. 560, p. 21)

The multiple basing-point delivered-price system was continued in full operation during the NRA Code period.

(q) For some seven months after the decision in the Schechter case (295 U. S. 495) the Institute, through its trade practice committee, composed of the same individuals who had previously constituted the Code Authority, attempted to administer some of the provisions of the NRA Code for the Cement Industry. The articles of association of the Institute, as amended December 11, 1935, contained in the statement of purposes of the Institute the following:

To adopt and promulgate a Code of Fair Competition for the government of the industry. (Com. Ex. 561, p. 5)

The Institute issued a so-called "Compendium of Established Terms and Marketing Methods of the Portland Cement Industry As Approved by the Board of Trustees of the Cement Institute December 9, 1935," which compendium contained the following provision:

All specific sales orders and specific sales contracts for the sale of Industry Products contain definite statements of price, quantities, terms of payment, time and place of delivery, and all other terms of sale necessary to form a complete and unambiguous contract. (Com. Ex. 561, p. 14)

and designated the following as an "unfair trade practice":

Diverting or permitting the diversion of shipments of Industry Products, the effect of which will be to enable a purchaser or user to secure Industry Products at variance with Member's published price-terms for point of final destination. (Com. Ex. 561, p. 16)

A standard form of sales contract recommended in the Compendium contains the following provision:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein * * *. (Com. Ex. 561, p. 21)

and the recommended contract form also states:

All shipments made on this contract will be at the current destination price of Seller on the date of shipment, if this price is below the contract destination price mentioned herein. (Com. Ex. 561, p. 21)

(r) The determination of respondents to maintain the multiple basing-point delivered-price system in the sale of cement and the degree of their resistance to selling f.o.b. mill are illustrated by certain occurrences with respect to the NRA Code for the Cement Industry. Ineffectual efforts to secure bids from cement manufacturers on an f.o.b. mill basis were made during the Code period by purchasing agencies of both State and Federal Governments. The failure of these efforts resulted in protests and objections by such agencies. On May 8, 1934, Barton W. Murray, Deputy Administrator of the National Recovery Administration, telegraphed B. H. Rader, chairman of the Code Authority for the Cement Industry:

I Have Been Requested By The President Of The United States To Encourage The Manufacturers Of Cement To Submit FOB Mill Prices To Prospective Purchasers Stop I Urge That This Question Be Placed Before the Code Authority For You Industry And A Report Of Their Action Thereon Particularly As It Affects Purchases By State And Federal Agencies Be Made To This Administration Within The Next Two Weeks (Com. Ex. 6-A)

On May 15, 1934, Mr. Rader replied, saying in part:

* * * We Earnestly Request Your Cooperation To Procure For A Small Representation Of Our Industry An Audience To Present To The President Of The United States The Facts As We See Them Which We Think Justify The Present Method Of Selling And Quoting Our Product * * * (Com. Ex. 6-B)

On May 17, 1934, John Treanor, president of Riverside, wrote Mr. Rader regarding this, saying in part:

I have been thinking about your telephone call, from which I get the impression that you sent a pretty unyielding telegram to Murray—as you say at least that you "did not intend to make any concession before the 'trading' starts."

Now I would have conceded the mill price at once on Federal business and I would have indicated a very open-minded attitude toward the larger question; and this to create the impression, deliberately, that something besides obstruction and short range trading can be had out of the cement industry. * * *

* * * * * * *

The f.o.b. mill price on Federal business is of no real importance, is entirely practical to grant, can and I think will be forced out of us—therefore good trading would have been to give it without any trading. Now, when it comes to the larger question of mill price on commercial business, much as I would like to think otherwise, I am convinced that we will have to maintain our basing point position and refuse the President's request. It will not be an easy refusal to defend upon economic grounds. It will be almost impossible to persuade an unsympathetic government that we are justified in our refusal. But the least we can do is to prepare the way by an initial showing of open mindedness, which might entitle our later arguments to sympathetic hearing. (Com. Ex. 7-A, B)

On May 24, 1934, Mr. Treanor wrote A. E. Morgan, Chairman, Tennessee Valley Authority, in part:

* * * It is certain that the entire cement industry will not voluntarily adopt the fob mill system, for a very substantial part of it, having made its plant investment with reference to the basing point system, now has a vital interest in keeping that system in force. * * * (Com. Ex. 347-C)

On June 4, 1934, Mr. Treanor telegraphed A. E. Morgan, informing him that the industry had requested an audience with the President to "inform him of the confusion which would result from any summary order to change marketing methods long established in the cement industry," and in referring to a suggestion by one of the President's secretaries that the industry have a hearing before Secretary

Ickes and Admiral Peoples, said that the industry should not "be required to deal with another committee upon the same subject at the same time" (Com. Ex. 350-C, D). On June 5, 1934, Mr. Rader wrote to C. F. Conn, president of the Institute:

Enclosed is copy of letter from Mr. Murray referring to my letter of May 24th regarding the request from the President to quote f.o.b. mill prices.

Also enclose copy of letter from Mr. M. H. MacIntyre to Mr. Murray and copy of Mr. Murray's letter to me.

After the receipt of these letters, Mr. Treanor was in Chicago and I asked him to take the matter up with Dr. Morgan, and I enclose copy of his telegram to Dr. Morgan.

I am now going to wait and see if this telegram produces results before following Mr. MacIntyre's letter any further. I feel that we must not be carrying on two hearings on the same subject. (Com. Ex. 839-4K.)

On June 7, 1934, Dr. Morgan wrote Mr. Treanor, replying to his telegram and saying in part that he had talked with the President on June 5th and "told him that in case the basing point system should be abandoned, I thought it should be only on the development of some other policy which would avoid confusion and which could have general application" (Com. Ex. 350-E). The industry did not comply with the request of the President.

Paragraph Eight: (a) In order for the pricing formula of lowest combination of base price plus all-rail freight to produce identical prices by all respondents selling or offering to sell at any given delivery point, it is necessary that the freight factor used in the delivered price of each seller be the same. The ascertainment of freight rates involves the use of complicated freight tariffs, knowledge of routing, switching charges, car weights, and other factors. Independent determination of freight rates may readily, and frequently does, result in different individuals reaching varying results.

(b). Members of the industry began many years ago to disseminate freight rate information among themselves in order to avoid quoting different delivered prices as a result of having used different freight rate factors in determining those prices. The cooperative preparation and publication of special freight rate books for use by cement producers was commenced about 1914 by various regional associations which included in their memberships some

of the present respondents. The Cement Manufacturers Protective Association, the Southeastern Portland Cement Association, the Kansas City Cement Bureau, and other organizations furnished freight rate information. That furnished by the Cement Manufacturers Protective Association until about 1922 was in much the same form as the rate information subsequently supplied by the Institute. When the Protective Association discontinued supplying freight rate information during the pendency of the suit brought against that association by the United States, many cement manufacturers thereafter obtained a similar service from the Nazareth Traffic Bureau. For a few years immediately preceding the organization of the Institute a number of respondents cooperatively compiled common freight rate factors, and others secured such rate factors from the National Traffic Bureau. On November 6, 1929, the traffic manager of the Cowham Engineering Company addressed a letter to the manager of one of the respondent companies under its direction and control explaining the reason for subscribing to the rate service furnished by the National Freight Rate Bureau, and stated in part:

As to the cost, we considered that it was quite reasonable for the reason that if we did not take the service we would have to compile our own rate books, involving additional clerical help and the cost of printing the rate books and supplements. This service cannot be compared with the old plan that was used in furnishing our company with rate books when the general revision of cement rates took effect on April 14, 1928. Due to the fact that it would have been impossible for each company to have compiled all rate books needed between the time that the tariffs were published by the railroad and the effective date, we entered into an arrangement with the other cement companies which provided that each company would compile one or more rate books and bill each company only for the cost of printing, it being thought that the cost of compiling or clerical help furnished by one company would practically offset this cost for all companies. This arrangement was only temporary and is to remain in effect only until such time as the National Freight Rate Bureau can finish compiling all rate books needed in the South. (Com. Ex. 988-A.)

(c) The Institute has maintained and operated two freight rate bureaus: one in Bethlehem, Pennsylvania,

managed by the individual who previously operated the Nazareth Traffic Bureau; and one in Chicago, Illinois. The Institute has published rate books for substantially every State east of the Rocky Mountains. These rate books show the railroad freight rates on cement from each of a number of points to all destinations in a given State or States. The manner in which this work of the Institute was initiated and superseded previous rate services is indicated in a letter of April 17, 1930, from the traffic manager of Lone Star to various offices of that company, as follows:

The Cement Institute will establish rate bureaus which should function in the near future. It is contemplated that the bureau established at Bethlehem will handle Trunk Line, New England and Southeastern territory. The bureau at Chicago will handle C. F. A. territory, and the bureau at Kansas City, Western Trunk Line territory. The bureau at Bethlehem will start immediately to reissue Trunk Line, which will include Virginia and West Virginia and the New England books. The plan for the Southeast is that those books will be reissued by those that formerly handled those books; this territory will be taken over by the bureau at Bethlehem soon after they are reissued.

Detail instructions will be issued by Mr. Gubernator, Chairman of the Traffic Committee of the bureau, and roughly speaking, will call for a reissue of the Alabama book by the Lehigh at Birmingham; Florida by the Consolidated at Chicago; Georgia by the Alpha at Birmingham; Mississippi by the Lone Star at Birmingham; South Carolina by the National at Birmingham; North Carolina by the Lehigh, Allentown. Tennessee by the Penn-Dixie at Chattanooga. The Kentucky book will be worked out by the Alpha at Chicago in connection with the bureau at that point. (Com. Ex. 2460.)

(d) The rate books published by the Institute were intended, as were those previously secured from other sources, to provide common freight rate factors for pricing purposes, avoid differences in delivered price quotations resulting from errors in rate calculations or failure to keep abreast of rate changes, and thus enable the corporate respondents to quote identical delivered prices for cement at all destinations; and they were in fact used for that purpose. Illustrative of this are the following ex-

tracts from exhibits and testimony. On February 25, 1916, C. N. Apgar, traffic manager of Alpha, wrote the Security Cement & Lime Company of Hagerstown, Maryland, as follows:

Replying to your favor of February 24th, would advise that it is the general understanding that the cement companies will use the books published by us. This is the book which we are using and which we will continue to use.

For your information, I might state that the Lehigh Company and ourselves watch the changes and exchange correction notices. (Com. Ex. 3199.)

In a letter of July 1, 1918, B. L. Swett, the eastern sales manager of Lehigh, wrote the Cement Manufacturers Protective Association:

Have you an extra West Virginia price book? If so, I will greatly appreciate if you can let me have it. (Com. Ex. 3200.)

The association official replied to Mr. Swett:

Responding to your letter of July 1st, File 65414-C, we are sending you under separate cover a copy of West Virginia Rate Book, which I take it is what you want.

In your letter you request a price book, which is no doubt a typographical error, inasmuch as you are aware of the fact that this Association does not issue any books in any way connected with price matters. (Com. Ex. 3200.)

In a letter dated September 3, 1931, Charles L. Hogan, then vice president of Lone Star, advised a divisional manager of that company who had suggested discontinuing the Institute rate service, in part:

From this you will learn that we in this office feel that the freight service is well worth the money that the Institute charges, in that it has a distinct advantage over any individual company record, because it seminates freight rate information to practically all of the companies in a given territory, and thereby serves to prevent variations in quotations by the various companies, which might be due entirely to incorrect freight information. (Com. Ex. 2461.)

In explaining the recommendation he had made, the divisional manager stated in a letter dated September 10, 1931, that:

Our recommendation was based solely in an effort to economize, feeling that we were sufficiently up to date with

our freight rate information; that we should be able with our present organization, to carry on this work in a reasonably satisfactory way, thus saving the company the cost of this service, which we estimated at $595.00. However, since receiving your letter and Mr. Hogan's letter of the 3rd we have reached the decision that this service is worth all that it costs. (Com. Ex. 2462.)

On October 4, 1934, J. F. Neylan, then assistant general sales manager of Lone Star, in writing to the Dallas office of that company, stated in part:

You have no doubt received copy of a letter from G. H. Reiter, Manager Chicago Division of The Cement Institute, which was addressed to Members in District No. 9. This letter has to do with an assessment to cover the compiling and distribution of freight rates on cement from all points of origin to Texas destinations.

We know you appreciate the advisability of having freight rates compiled at one central point and issued to all members operating in any given district in order that everyone may be operating on the same rate. This is being followed in practically every other section of the country and we are of the opinion it should be continued in Texas. (Com. Ex. 2417.)

Under date of November 7, 1936, the manager of the Institute Rate Bureau in Bethlehem, Pennsylvania, wrote to Volunteer explaining the omission from Institute rate books of information on switching charges, stating in part:

As you probably understand, rate books show lowest rate available to any given destination, and are not intended for shipping purposes. And, under these circumstances, we do not carry destinations which are located within switching districts of stations to which rates are published or, as in the instant case, where it is possible to accomplish delivery at the Knoxville rates. (Com. Ex. 1002-B; Resp. Ex. 2243-A.)

In addition to the office use of the Institute freight rate books, they were frequently furnished by respondents to their salesmen for use in calculating and quoting prices. For example, the sales manager of Edison testified:

Q. Of what value are any of these freight rate services to you?

A. Well, they are only valuable in so far as they are—the books are convenient. The rates are shown in a form that we use them in our business, and they are convenient.

Q. And convenient for what, Mr. Sweeney?

A. For the salesmen who carry them for their particular territories—they can carry them a whole lot more conveniently than they could a long list of freight rates which we might prepare and furnish to them.

Q. You use them mostly for quotation purposes?

A. That is all. (T. 35807)

The sales manager of Coplay testified:

Q. Where your salesmen do carry them, do they use them to calculate the delivered price at the different destinations?

A. Presumably they do, but it is understood that all quotations are to be confirmed at the office.

Q. You supply them with the freight rate books so that they may use them for that purpose?

A. Yes, sir. (T. 6777)

In writing one of its district sales managers on November 11, 1936, criticizing the use, in computing a price, of a rate which did not appear in the Institute rate book, an official of Lone Star stated in part:

So far as our company is concerned, we have always worked on a policy that the freight rates shown in the rate books are the only rates we will use in the computation of prices. If we have knowledge of any rates that are different from those in the rate books, then we have an obligation to inform the Rate Bureau of the new rate before such a rate is used in computing a price. (Com. Ex. 287-B)

(e) The freight rate books first issued by the Institute included conversion tables for use in translating rates quoted by the railroads in terms of cents per hundred pounds into rates in terms of cents per barrel of cement of 380 pounds gross weight, the barrel being the unit used in the quotation and sale of cement. These tables provided for eliminating fractions of a cent in the rate per barrel, presumably to avoid fractions in price quotations, by stating the converted rate in cents per barrel to the nearest cent. In calculating freight charges, railroads apply the rate per hundred pounds to the total weight of a shipment and if the resulting figure ends with a fraction of a cent, they eliminate that fraction. In all instances, therefore, where the conversion of a rate per hundred pounds into a rate per barrel resulted in eliminating a fraction of a cent in the latter rate, a calculation of the

cost of a shipment according to the Institute formula would give a result different from a calculation made according to the method followed by the railroads and on which payment of freight charges must be made. By action of the Institute in May 1937, the conversion tables were omitted from the rate books issued by its bureau in Bethlehem, and they had been previously dropped from the rate books issued by its bureau in Chicago. The same method of conversion into rates per barrel has, however, been continued. The rate books lack information that a genuine rate service would be expected to supply: they give no information which would assist in routing shipments; they give no information concerning minimum car weights; and they give no information respecting switching charges.

(f) When the Institute rate service was organized, there was discussion as to whether rates would be shown in the rate books from basing points only or from all points where cement is produced. A member of a committee of traffic managers, in writing to the chairman on August 6, 1930, stated the problem thus:

Confining the rate books to certain points of origin, would eliminate a lot of extra information that is of no value, while the master rate sheets, showing the rates from all points of origin, would supplement that information so that each subscriber would have all the rates. The method appears to be more economical and more efficient, however, it does not answer the question as to why you show rates from certain points of origin, and not others. This subject has been discussed a number of times, and one of the reasons for showing all the rates in the rate books is to avoid any appearance of preference. (Com. Ex. 1139-4H)

The rate books were revised in 1933 to show rates from more producing mills, but rates from all producing points have not been included. These rate books, however, have included rates from points such as ports where no shipments of domestic cement originate, but which have been used as basing points for pricing purposes.

(g) The Institute rate books have regularly been used for pricing purposes, either directly or indirectly, by most of the corporate respondents located in territory covered by the rate books, and this has been done even though a price quotation made on the basis of a converted rate may

include an artificial freight rate factor. The following extracts from testimony are illustrative of this. A representative of Federal testified:

Q. And hasn't it been your experience that the price at those various destination points in your sales territory always correspond with the freight rate in the freight rate book, including the correction sheet information plus the controlling base?

A. Yes, generally speaking, I think you are absolutely right there. It is a pattern that we follow on basing prices, we use our freight rate, we add our package plus that constant figure that we have predetermined. (T. 30825)

In his testimony, the traffic manager of Volunteer said:

Q. But with the exception of arbitraries, have you ever found a price at a destination point which was not built up on a base plus the Institute freight rate book?

A. No, I don't think that I have.

Q. In your 10 years' experience?

A. I do not think so. (T. 31934)

All-rail freight rates have regularly been used in calculating delivered prices, even though shipment was made by water transportation or by motor truck at rates different from the all-rail rate on which the price was calculated. The use of Institute freight rate books was not limited to members of the Institute; non-members were permitted to, and some did, purchase rate books from the Institute.

(h) Respondents extended their cooperative rate dissemination activity to land-grant rates for the same purpose as existed with respect to commercial rates discussed above. Land-grant rates are special rates received by the Government from certain railroads. In order to secure the benefit of such rates on a shipment over these railroads, the shipment must be one of Government property on a Government bill of lading. Since such rates are not available under any circumstances to any of the corporate respondents, their cooperative activity with respect thereto emphasizes their true interest in common freight factors—the use thereof as a means of attaining and maintaining identical delivered prices.

(i) Government purchasing officers frequently requested cement bids both f. o. b. mill and at specified delivery points. Respondents ordinarily determined the delivered price to be bid according to the formula of lowest

combination of base price plus freight, which produced identical delivered prices. By deducting from the destination price determined in this manner the actual freight from his own mill to the delivery point, each bidder arrived at a so-called f. o. b. mill price which was in fact a derived price. The derived f. o. b. mill prices thus calculated might vary greatly among bidders on a given bid, but resulted in identical cost to the Government at the point of delivery. This method worked satisfactorily to respondents in territory where land-grant rates were not available to the Government, but did not operate very satisfactorily in the case of bids in territory where land-grant rates were available to the Government because the application of land-grant rates to an f.o.b. mill price determined in the manner stated ordinarily destroyed the uniformity of destination costs. Sporadic efforts to correct this difficulty were made by respondents in land-grant territory by using land-grant rates in determining delivered prices and derived f.o.b. mill prices. This would have solved respondents' difficulties if they could have accurately ascertained the applicable land-grant rates. Such rates, however, are a matter between the Government and the railroad concerned. There is no official publication of such rates and it is generally impossible to determine in advance what the rate will be. In practice, the land-grant rate actually paid is determined by the Government upon the facts of the particular shipment, and this figure is controlling unless the railroad successfully contests it before the United States Court of Claims. Respondents, however, did what they could to ascertain the land-grant rates applicable in specific instances, sometimes securing information from the railroads, sometimes from previous lettings, and sometimes from competitors. During this time there was substantial interchange of land-grant rate information among respondents interested in particular bids, and from time to time groups of repsondents concerned in the same bid had understandings and agreements as to the rates to be used or the price to be bid.

(j) The land-grant rate problem was not, however, of great importance to respondents until, under the stimulus of the expansion of public works in the early 30's, governmental purchases of cement assumed important proportions. A rapid expansion of such purchases was coincident with the existence of the National Recovery Admin-

istration, and it was while operating under their NRA Code that respondents first found a satisfactory answer to the land-grant rate problem. At first the Code Authority for the Cement Industry was satisfied to continue the previous practice. On December 23, 1933, it issued an interpretation to the effect

* * * that United States Government may be quoted with the use of land grant rates, in exact accordance with the prevailing practice prior to the adoption of this Code. (Com. Ex. 716-A)

Under the Code, respondents filed their destination prices with the Code Authority and these were systematically disseminated among respondents by the Code Authority, although the Code did not specifically provide for such dissemination. The result was to facilitate greatly the efforts of respondents to make identical bids to the Government. Purchasing officers of governmental agencies developed a policy of deducting commercial freight from destination prices bid by respondents and then awarding the contract upon the basis of the lowest delivered cost, using land-grant rates. This practice resulted in creating differences in otherwise identical bids.

(k) Respondents, however, found a means of defeating the deduction by the Government of commercial freight in land-grant territory. A clause for insertion in bids to the Government, which became known as the "control clause," was developed and filed with the Code Authority. This clause went through several changes in form and finally, as most frequently used by respondents, assumed the following form:

The U. S. Government shall determine its cost f.o.b. cars ..... for invoicing purposes on shipments moving on U. S. Government bills of lading to the above named destination only, by substracting from the above mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. Government as being applicable from ..... to said destination, the actual commercial freight rate or special U. S. Government rate applicable from ..... to destination named, whichever rate is the lowest. (Com. Ex. 558-C)

The chairman of the Code Authority in a letter dated April 11, 1935, explained the effect of this clause in part as follows:

Under the open price provisions of our Code interested

competitors have knowledge of such Government Destination costs filed with us and may meet them if they care to do so, thus making it possible for all interested Members of this Industry to bid on a parity. A control clause usually in the form of that quoted in our General Letter of October 5, 1934, requires the Government to deduct the actual land grant rate from the Government. Destination Cost bid and thus in effect continues the parity as between derived prices f. o. b. mill. (Com. Ex. 277-K)

In the same communication he also referred to the general letter issued by the Code Authority on November 19, 1934, which expressed the opinion that a member of the industry would be in violation of the Code if he allowed the Government to deduct commercial freight to determine the price f.o.b. mill for cement to be shipped on Federal bills of lading. The Code Authority promoted and furthered the use of the control clause in bids made to the Government by members of the industry, and its use did, in fact become widespread. The decision in the Schechter case did not end the use of the control clause in Government bids.

(1) Before respondents developed the method stated above for handling Government bids involving land-grant rates, each proposal upon which bids were requested was generally handled separately and involved cooperation among the respondents concerned which in some instances amounted to agreements upon bids to be made. The exchange of telegrams and letters set out below illustrates how a group of bidders were able to file identical sealed bids. On March 17, 1934, the vice president of Pacific telegraphed the chairman of the Code Authority:

Referring Phone Message Date With You And Your Assistant Pertaining Application Land Grant Rates Stop Southern California Mills Insisted On Making Prices Where Land Grant Rates Involved Stop Basis To Use Was List Price At Destination Less Commercial Freight Rate Stop On Large Order At Nogales Opened Early Part Of February Cement Manufacturers Bid On This Formula And Developed That Through Application Of Land Grant Rates It Made Calaveras Mill Approximately Two Cents Barrel Low And They Secured Business Stop It Was Then Decided The Only Way to Quote Government Projects Where Land Grant Or Other Special Rates Were Used Which Were Lower Than Published Rates As Con-

tained In Railroad Company Tariffs The Following Formula Should Be Used Stop Takes Destination Price Deduct From All Interested Mills Their Commercial Freight Rate Then Add For Comparative Purposes Their Land Grant or Special Rate Applicable Which Will Give Cost To Government At Destination From Various Mills And The Highest Rated Mill If They Were Interested Would Have To Deduct From Their Mill Price The Difference To Equalize With The Lowest Rated Mill And This Has Worked Out In Satisfactory Manner To Interested Parties For The Reason That The Prices So Arrived At At The Various Mills Plus Rate Government Would Pay Would Make Same Total Price At Destination Stop The Government Is Calling For Bids At Bonneville Oregon Opening March Twenty Third And This Formula Was Suggested To Oregon Mills At Conference At San Francisco Friday But They Claim In Their Opinion Proper Method To Use Would Be Destination Price Less The Commercial Or Land Grant Rate As The Case Might Be With Freights Equalized With The Lowest Rated Mill Stop Will You Please Wire Us First Thing Monday Morning So That We Can Notify Interested Parties How We All Shall Figure Bonneville Bid Based Back To A Mill Price Which In All Cases In Our Opinion The Mill Price Must Be The Difference To Equalize With The Lowest Rated Mill Stop Also Appreciate If Ascertain And Wire What Mill Price Calaveras And Monolith Are Going To Use Stop * * * (Com. Ex. 159-1, 2)

Respondents Beaver and Oregon on the same date also wired the then chairman of the Code Authority concerning the bids on cement for the Bonneville Dam and stated in part:

* * * An Immediate Ruling By The Code Authority To All California Oregon And Washington Mills Which Will Provide A Method Of Bidding Equitable To All Will Be Greatly Appreciated Otherwise We Fear Many Violations Of The Code Will Be Apparent When Bids Are Opened On The Twenty Third Stop * * * * (Com. Ex. 159-3, 4)

The chairman of the Code Authority wired respondent Beaver on March 22nd:

Retel As Bonneville Letting Is Twenty Third And Prices Must Be On File In Office Of Code Authority Five Days Prior To Use No Prices Terms And Conditions Filed To-

day Can Apply And Only Price On File Now Is Two Fifty Six Gross Bulk FOB Bonneville Stop * * * (Com-Ex. 159-18)

Oregon, Beaver, Pacific, Santa Cruz, Monolith, and Henry Cowell Lime & Cement Company bid $2.56 f.o.b. Bonneville, or derived mill prices equivalent to $2.56 f.o.b. Bonneville. Calaveras bid $2.5307296 f.o.b. Bonneville and was low (Com. Ex. 159-40). Thereupon, respondent Santa Cruz filed protest with the Code Authority which concluded:

* * * Inasmuch As Each Bidder Was Required To Make Affidavit That Its Bid Was In Accordance With Terms Of The Code or The Cement Industry Should Not Calaveras Bid Be Disregarded? (Com. Ex. 159-25)

The Code Authority on April 13, 1934, protested to the National Recovery Administration, which, in turn, advised the Secretary of War in part:

You are informed that the Administrator for Industrial Recovery has found that the bid of the Calaveras Cement Company did not comply with the Code. Inasmuch as nearly all the other bids have been found to be in violation of the Code, it is recommended that all bids be rejected. (Com. Ex. 159-56)

This recommendation was followed and the bids were rejected. The final result was that on another letting all bids were identical and the contract was awarded by lot.

(m) The filing of "destination cost" prices on Government business under the NRA Code and the dissemination of these prices among respondents by-passed the difficulties of reaching identical delivered prices where land-grant rates were involved. After the Code period, however, the problem was once more with respondents. As a solution, the Institute undertook to collect and disseminate land-grant rates and thus provide common freight factors on Government business, as was done through the rate books for commercial business. The Institute began collecting from its members such information as they had concerning land-grant rates and assigned the responsibility for furnishing such information for specified territories to particular respondents. Under date of December 12, 1935, The Cement Institute circularized its members, stating in part:

At its meeting on December 9 the Board of Trustees instructed the General Manager to collaborate with the

Freight Rate Bureau at Chicago in compiling and publishing for the convenience of the Members information regarding current Land Grant Rates on cement from the several points of origin to various destinations.

It is the intention of the Institute to publish a schedule of current Land Grant Rates just at is has long been the practice to compile and publish the actual commercial rates. Where it is impossible to secure the exact Land Grant Rates, the best available information, together with the source thereof, will be published.

We are, therefore, addressing each member and requesting you to send us all the information which you have concerning current Land Grant Rates applicable from your mills and also such information as you have concerning Land Grant Rates applicable from other mills. In compiling this data it is necessary that we designate the source of the information regarding such Land Grant Rates. Will you, therefore, indicate in each case the source of your information regarding the respective Land Grant Rates? (Com. Ex. 841-A)

(n) There being no official publication of land-grant rates, the Institute publication of such rates included figures arrived at by various means: some were secured from railroads; some were determined as a result of previous transactions; some were derived by calculation; some were derived by mileage pro-rates; and some were obtained by other means. When the amount of a given rate as furnished to the Institute by different sources varied, the lowest of such rates was reported by the Institute. The explanation of the land-grant rate schedules issued by the Institute states in part:

The term the lowest land grant rates indicates that in many instances the current applicable land grant rate between two given points was reported variously by different sources, and that the figure included herein was the lowest land grant rate reported to the Institute on the date of issuing this schedule.

In no case does the figure represent a computation by The Cement Institute, which merely serves as the medium for exchanging information. Furthermore, there is no assurance that the stated land grant rate will be the exact one which will be computed and used by the U. S. Government in any particular case. (Com. Ex. 841-J)

Under date of January 2, 1936, the Institute in a circular letter to its members gave a more detailed statement with respect to the collection and dissemination of land-grant rates. It stated in part:

Briefly stated, our purpose in this regard is identical with the purpose which we have pursued for many years through our Traffic Bureaus in compiling and distributing information to the members regarding commercial freight rates. In other words, it is recognized that the cost of transportation is a necessary element for each manufacturer to consider when he quotes a price or files a bid on any other basis than f.o.b. mill. The compilation of freight rates provides a convenient instrument for the cement manufacturer in determining a delivery price, whenever he chooses to quote such a price.

* * * * *

During the N. R. A. code period when all cement manufacturers were required to file their prices and terms of sale, the methods which the different companies followed in bidding on Government business was a matter of public record. It became evident that many of the companies labored under difficulties, since it seemed that they were unwilling to deviate from their long established practice of quoting destination prices and yet bids of this nature would not assure to the Government the benefit of land grant rates.

In the Code days, companies which did not desire to quote f.o.b. mill prices to the Government filed their bids with certain control clauses, and as these conditions were made public other companies either adopted them or made certain changes. The result was that it became a widely prevalent practice, in the case of bids to the United States Government, for cement companies to quote what was called a "Government Destination Cost."

In bidding a Government Destination Cost it was the practice of the individual company to quote a figure which was based upon the mill net return (that the company was satisfied with in the particular case) to which was added the land grant or special rate to the destination. In the absence of exact information regarding the applicable land grant rate the company added its best approximation of that rate. The result was the so-called "Government Destination Cost", which was filed as a bid on the condition that the Government could determine the bidder's mill

price (for purposes of invoicing) by subtracting the actual land grant rate or some other specified amount.

The so-called open price plan is no longer operative in the cement industry, so that it will no longer be possible for the Cement Institute to handle the filing of prices or of the Government Destination Costs. Nevertheless, the problems which arose under the open price plan continue to exist.

* * * * * * *

* * * Therefore, it is frankly admitted that, except in rare instances where the Government will make such computations and publish them in advance, it is not possible for anyone to have accurate information regarding the land grant rate applicable at a particular time between two particular points.

Nevertheless, the method of computing such land grant rates is so well known that the discrepancy between the figure arrived at by the Government and the figure arrived at by the railroads or others is negligible. For all practical purposes it is possible to secure estimated land grant rates which are practically identical with the actual ones. For this reason a careful computation of land grant rates amounts to factual data rather than to fanciful or arbitrary figures.

It is further recognized that it is a considerable burden for any individual company to secure information regarding all applicable land grant rates. It is obvious that cooperation of all the companies through the Institute will lessen this burden on each and should make it possible to secure the factual data more promptly and make it available for the assistance of each company. (Com. Ex. 95-A, B, C)

A little more than a year after the date of the above communication, the general manager of the Institute notified members that "effective immediately The Cement Institute will discontinue the distribution of information on land grant rates * * *" (Resp. Ex. 169).

(o) The publication by certain respondents on the Pacific Coast of price lists showing commercial delivered prices at most destinations, and the exchange of such lists among themselves, did not aid such respondents in maintaining identical prices on sales to the Government where land-grant rates were involved. For a time there was

some informal interchange of land-grant rates among certain of these respondents. This was followed in 1936 by the organization of the Pacific Coast Cement Institute, composed of members of the Institute and originally intended to become a division of the Institute. The relationship between the Pacific Coast Institute and the Institute was close, and for a considerable time after its organization the president of the former was a trustee of the latter. One of the principal activities of the Pacific Coast Cement Institute was the collection and dissemination of land-grant rate information. In practice, the member respondents requested information on such rates from the secretary of the Pacific Coast Cement Institute as needed, and in replying to such inquiries the secretary sent copies of his letter to others so situated as to be in a position to bid on the particular project. Typical of the letters of notification sent by the secretary is the following:

The Southern Pacific Company general offices at San Francisco advise, under their file No. 2-S-12050-6702, that the following are the current commercial and approximate land-grant rates (in cents per 100 lbs.) on cement, minimum carload weight 60,000 pounds to Elko, Nevada.

To Elko, Nevada

From		Commercial Rate	Land Grant Rate
Davenport,	Cal.	30½	29.756
Redwood City,	"	30½	None
Cowell,	"	30½	None
Stockton,	"	30½	None
Kentucky House,	"	30½	None
Merced,	"	30½	None
Devils Slide,	Utah	30½	None
Monolith,	Cal.	47	43.268
Victorville,	"	61	52.310
Colton,	"	56	47.310
Crestmore,	"	56	47.858
Los Angeles,	"	56	48.532
Long Beach,	"	59½	50.814
Salt Lake City,	Utah	30½	None

(Com. Ex. 564-Q)

Paragraph Nine: (a) Respondents' pricing formula, when supplemented by common freight factors, inevitably produces identical prices at any given delivery point by all sellers who use it. Identical prices are important to respondents because, under the conditions which have existed, a difference in price as small as one cent per barrel may divert business from one seller to another. In testifying, numerous officials of respondent companies have stated that ordinarily the commercial prices of all sellers of cement at any given delivery point are the same. An examination and comparison of the invoices in the record covering actual sales of cement made in April 1938 in some 250 widely scattered communities shows an extremely high degree of uniformity in the delivered prices of cement at each delivery point by all respondents who made sales there. In particular locations at particular periods of time there have been arbitrary prices, including zone and area prices, and there have been instances where departures from the pricing formula have caused price differences, but in general it is true that the commercial delivered prices of all respondents making sales of cement at any given location have been identical.

(b) The perfection of respondents' pricing formula in producing identical delivered prices is best illustrated, however, by sealed bids made to public agencies. Instances of bids by various respondents to public agencies, some of which involved the use of commercial rates and some the use of land-grant rates, follow. An abstract of the bids on 8,000 barrels of cement for the Navy Department at Brooklyn, New York, opened May 29, 1936, shows the following:

Name of Bidder.	Price per Bbl.
Allentown Portland Cement Co.	$2.43
Alpha	2.43
Coplay	2.43
Edison	2.43
Giant	2.43
Hercules	2.43
Keystone	2.43
Lawrence	2.43
Lehigh	2.43
Lone Star of New York	2.43
National	2.43
Nazareth	2.43
North American	2.43
Penn-Dixie	2.43
Standard Lime & Stone Co.	2.43
Universal	2.43
Vulcanite	2.43
Whitehall	2.43

(Com. Ex. 387-E, F)

An abstract of the bids on 1,200 barrels of cement to the United States Engineer Office at Vicksburg, Mississippi, opened August 30, 1937, shows the following:

Name of Bidder	Destination Cost to Government, F.O.B. Monroe, La., on Government Bills of Lading	Amount F.O.B. Local Switch Missouri Pacific Railroad, Monroe, La.
Penn-Dixie	$2,772	$3,060
Arkansas	2,772	3,060
Universal	2,772	3,060
Cumberland	2,772	3,060
Trinity	2,772	3,060
Signal Mountain	2,772	3,060
Alpha	2,772	3,060
Lehigh	2,772	3,060
Lone Star	2,772	3,060
Monarch	2,772	3,060
National	2,772	3,060
Consolidated	2,772	No bid
Volunteer	2,772	3,060
Georgia	2,772	3,060
Hermitage	2,772	3,060

All bids subject to 10¢ per barrel discount for payment in 15 days. (Com. Ex. 180-A)

An abstract of bids on 600,000 barrels of cement in bulk and 10,000 barrels sacked in paper to the War Department for the Fort Peck, Montana, dam, opened July 25, 1935, shows the following prices per barrel:

Name of Bidder	Bulk per Bbl.	Paper per Bbl.
Universal	$2.5054	$2.7145
Huron	2.5054	2.7145
Three Forks	2.5054	2.7145

All bids subject to 10¢ per barrel discount. (Com. Ex. 168-A)

A list of the bids for 500 barrels of cement for the United States Industrial Reformatory at Chillicothe, Ohio, opened June 12, 1936, shows the following:

Name of Bidder	Price per Bbl.
Alpha	$2.02
Green Bag (West Virginia)	2.02
Southwestern	2.02
Standard	2.02
Universal	2.02
Medusa	2.02
Pittsburgh Plate Glass	2.02
West Penn	2.02
Bessemer	2.02
Lehigh	2.02
Superior	2.02
Louisville Cement Co.	2.02
Diamond	2.02
Wabash	2.02

All bids were subject to 10¢ per barrel discount for payment in 15 days. (Com. Ex. 373-A)

An abstarct of the bids for 1,000 barrels of cement for the United States Penitentiary at. Leavenworth, Kansas, opened September 3, 1935, shows the following:

Name of Bidder	Price per Bbl.
Universal	$2.163424
Ash Grove	2.163424
Missouri	2.163424
Lone Star	2.163424
Lehigh	2.163424
Monarch	2.163424
Consolidated	2.17528
Dewey	2.163424

All bids subject to a 10¢ per barrel discount for payment in 15 days. (Com. Ex. 370)

An abstract of the bids to Tennessee Valley Authority on 200,000 to 800,000 barrels of cement, or partial quantity, at Coal Creek, Tennessee; 100,000 to 700,000 barrels, or partial quantity, at Wheeler Dam; 100,000 to 700,000 barrels, or partial quantity, to the Wheeler Dam Authority; and 100,000 to 700,000 barrels, or partial quantity, at Sheffield, Alabama, opened October 15, 1934, shows the following:

Name of Bidder	Coal Creek	Wheeler Contractor	Wheeler Authority	Sheffield, Alabama
Alpha	—	$1.8798	$1.8398	$1.7008
Universal	—	1.8798	1.8398	1.7008
Marquette	—	1.8798	1.8398	1.7008
Lehigh	—	1.8798	1.8398	1.7008
Hermitage	$1.7384	1.8798	1.8398	1.7008
Cumberland	1.7384	1.8798	1.8398	1.7008
Signal Mountain	1.7384	1.8798	1.8398	1.7008
Lone Star (Alabama)	—	1.8798	1.8398	1.7008
National	—	1.8798	1.8398	1.7008
Georgia	—	1.8798	1.8398	1.7008
Penn-Dixie	1.7384	1.8798	1.8398	1.7008
Volunteer	1.7384	—	—	—

All bids were subject to a 10¢ per barrel discount for payment in 15 days. Some bidders limited their offers to partial quantities. (Com. Ex. 401)

An abstract of the bids for 6,000 barrels of cement to the United States Engineer Office at Tucumcari, New Mexico, opened April 23, 1936, shows the following:

Name of Bidder	Price per Bbl.
Monarch	$3.286854
Ash Grove	3.286854
Lehigh	3.286854
Southwestern	3.286854
Oklahoma	3.286854
U. S. Portland Cement Co.	3.286854
Consolidated	3.286854
Trinity	3.286854
Lone Star	3.286854
Universal	3.286854
Colorado	3.286854

All bids subject to 10¢ per barrel discount for payment in 15 days. (Com. Ex. 175-A)

(c) The operation of the pricing formula in bids submitted to State agencies is indicated in the following description of a few such bids:

On January 18, 1935, the Louisiana Highway Commis-

sion received bids from Trinity, Marquette, Monarch, Universal, Penn-Dixie, Lehigh, Alpha, Arkansas, and Lone Star for 238,000 barrels of cement delivered at 70 different destinations. Although differing as between destinations, all of the bids at each destination were identical, except that Monarch was higher than the other bidders at three destinations. (Com. Ex. 2454 A-B.)

On March 30, 1937, the Illinois Highway Commission received bids for 125,000 barrels of cement delivered at 102 different destinations. Alpha, Lehigh, Marquette, Universal, Lone Star, and Medusa bid at all destinations; Missouri bid at 71 destinations, Dewey at 56, and Ash Grove at 35. Although differing between destinations, all of the bids received at each of 98 destinations were identical; Dewey was higher than the others at one destination, and Lone Star was higher at two and lower at one destination than the others (Com. Ex. 1879).

In February 1937 the North Carolina Division of Purchase and Contract received bids for 500,000 barrels of cement. Excluding a few destinations at which only one bid was received, the record shows bids at 144 destinations. Cumberland and National bid at 115 destinations; Southern States, Superior, and Hermitage at 113; Penn-Dixie at 112; Lehigh at 111; Signal Mountain at 110; North American at 97; Medusa and Universal at 94; Lone Star and Volunteer at 92; Alpha at 83, and Standard Lime & Stone at 81. Although differing between destinations, all the bids received for each destination were identical, except that Lone Star was higher than other bidders at two destinations, Cumberland was higher than others at one destination, Superior was higher at one, and Volunteer was higher at one destination (Com. Ex. 12 A-B).

(d) Sometimes a respondent, who for some reason did not desire to sell at a particular location but did at others, or wished to retain his name on the list of bidders, bid a price higher than the basing-point pattern provided. When a respondent, by reason of miscalculation or mistake, made a bid lower than the basing-point pattern provided, he would sometimes correct or withdraw, or seek to correct or withdraw, such bid.

(e) Except to the extent that the dissemination of delivered prices during the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct ex-

changes among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices. No such exchange is needed in the successful operation of the multiple basing-point delivered-price system. When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made. Notices of price increases are usually sent to customers five days in advance of the effective date thereof; and in the case of a decrease, customers are usually given the benefit of the decrease on shipments made during the five days preceding the decrease.

Paragraph Ten: (a) In the operation of the pricing system hereinbefore described, national in its scope, it is to be expected that there will be some producers who prefer more independence of action than the system permits, who wish to exploit natural advantages, or who cannot resist the temptation to break away from the system in seeking particularly attractive business. This has occurred, and the departures have probably been more frequent among price followers. Successful maintenance of the system requires, therefore, that the price leaders, usually the larger chain mills, possess the power to force recalcitrants to adhere to the system and that this power be exercised when necessary. The multiple basing-point delivered-price system has inherent within itself means for enforcing its observance. One producer can, by putting a base price into effect at the mill of another producer, absolutely fix the maximum mill net of that producer, usually without affecting the mill net on more than a portion of his own business. If a large producer with mills at many points places a base price upon the mill of another producer, the effect upon his own mill net may be insignificant. The loss of the producer whose mill has been subjected to an involuntary or punitive base is much greater than the loss of the producer who imposes the

base, because the net return on all of the former's business is affected. In practice, punitive bases have frequently been lower than the base price of the seller imposing them. An involuntary base tends to localize the price cut made and place the maximum effect thereof upon the producer whose departures from the pricing formula have invited the imposition of a punitive base. Some of the leaders of the cement industry have not hesitated to use this instrument to force adherence to the pricing system used in the cement industry. The following circumstances illustrate the operation of this policy.

(b) In 1927, about a year after the South Dakota State Cement Mill began operating at Rapid City, Lehigh applied an involuntary base to it which resulted in lowering the mill net of the new plant by approximately 60 cents per barrel. A representative of Lehigh testified that before the imposition of this involuntary base the State plant had made many prices lower than its openly published prices. In January 1930, at a time when prices were increased at surrounding basing points, the base price at Rapid City was left unchanged. Correspondence between representatives of Monolith Midwest indicates that the reason the base price at Rapid City was left unchanged was that the State mill had not fully conformed to its competitors' views of what constituted proper practices in the sale of cement. A letter between these representatives dated January 22, 1930, states in part:

Yesterday morning Mr. Morse of the Colorado Portland Cement Co. phoned and said that Mason City base was up 25¢, that he had heard of no changes. Immediately on receipt of this information I telephoned to Mr. Hartley and he told me that he had quotations out raising his mill base 25¢ at points where it applied in Wyoming, Nebraska, North and South Dakota, but that he was having difficulty in the eastern part of his territory and he did not know whether or not he would stand by these quotations. It all depended on whether or not the other manufacturers were going to follow. I assured him that we would follow in Wyoming but that we could not speak for the rest of the industry, although I would take the matter up with the Colorado Portland Cement Co. This I did and Mr. Morse assured me that he would raise his prices in Wyoming 25¢, wherever the Rapid City base governed.

I telephoned this information to Mr. Hartley and he said

that he would let his quotations stand but he wanted the Colorado Portland Cement Co., to commit themselves to him and asked me to have Mr. Warner telephone him. This I did and late in the afternoon Mr. Morse called me and said that he had been talking to Chicago and had learned from them (I suppose he meant Universal) that Rapid City had quotations out on the new figure but that they accepted business at the old price for shipment during April. Morse said that in view of this he was reluctant to change his quotations until he was sure that Rapid City would stay in line. This morning Mr. Warner telephoned me and said that he was leaving tonight for Chicago to attend a meeting and endeavor to straighten up the situation. (Com. Ex. 1202-G.)

A second letter between the same parties dated January 30, 1930, states in part:

This morning Mr. Warner of Colorado Portland Cement Co., advised me by phone that the gas belt mills had increased their base 20¢ per barrel. This means a general increase in prices in practically all of our shipping territory. The basing point will move from Iola to Kansas City. As yet there has been no changes reported from either Sugar Creek or Bonner Springs so we are basing our new prices on $1.55 Kansas City.

Warner had just returned from Chicago and he says that the powers in the East are inclined to let the Rapid City base stay where it is; in other words, they will not increase price where Rapid City controls until they have some definite assurance from Rapid City that they will abide by it. Warner says that they put out quotations on a base of $1.65, their mill, and then were willing to accept business for delivery during April. As long as this condition is in effect, it means there will be no change in prices at any Wyoming points controlled by Rapid City.

Warner further said that the industry as a whole hesitates to take this matter up with the South Dakota officials because their experience in the past has been that the Governor of South Dakota broadcasts anything that is told to the officials of the cement plant and makes the statement that the cement trusts are trying to control their mill. (Com. Ex. 1202-K.)

(c) On December 5, 1927, Lone Star imposed an involuntary base at a non-base mill at Spocari, Alabama.

In furnishing information to John M. Clark and Arthur R. Burns, two economists employed by the Institute, Lone Star explained this action by saying:

Spocari producer was found to be passing to buyers, secret rebates (representing freight advantage) deducted from open quotation calculated on N. Birmingham base. (Com. Ex. 975-5U.)

The following year Lone Star acquired this mill upon which it had imposed an involuntary base.

(d) The tabular statement in Paragraph Three setting forth total sales of cement by years shows the heavy toll the advancing depression began to take in the cement industry in 1930 in the form of reduced sales. This decline in sales volume led some of the respondents to seek attractive orders through departures from the multiple basing-point delivered-price formula in the form of nonidentical lower prices in particular transactions. As these departures became more frequent, numerous involuntary punitive bases were imposed upon price-cutters. Lehigh placed an involuntary base upon the Painesville, Ohio, mill of Standard. A representative of Lehigh, in explanation of this, testified that Standard's prices appeared to vary from day to day and job to job. Alpha placed involuntary bases upon the Osborn, Ohio, mill of Southwestern and the Fultonham, Ohio, mill of Pittsburgh Plate Glass. A representative of Alpha, in testifying concerning this, indicated that the action was the result of spotty competition. Lehigh placed involuntary bases upon the Louisville, Nebraska, mill of Ash Grove and the Kosmosdale, Kentucky, mill of Kosmos. Involuntary bases were also established at the Ada, Oklahoma, mill of Oklahoma; the Dewey, Oklahoma, mill of Dewey; the Superior, Nebraska, mill of Nebraska; the Cape Girardeau, Missouri, mill of Marquette; and at other points.

(e) The unsettled price conditions during this period and the imposition of numerous involuntary bases created considerable resentment on the part of some respondents against what was felt to be the arbitrary action of the larger units in the industry, and both conditions contributed to the withdrawal of many members from the Institute and the Portland Cement Association. There was much activity among respondents in seeking to work out the situation, restore price stability, and secure the removal of the involuntary bases. Illustrative of these activities are the

following extracts from correspondence among various respondents. On April 23, 1931, W. H. L. McCourtie, president of Trinity, wrote Joseph S. Young, chairman of the committee on public relations of the Portland Cement Association and president of Lehigh. After setting forth how thoroughly Trinity had cooperated with the association since 1916, Mr. McCourtie stated:

* * * In view of the fact, however, that conditions indicate—at least as I see them from this distance—that a dissolution or a disintegration of the Association is now imminent, I can see no very good reason for its acquiring or our giving any information which is intended to be used for the benefit of the industry as a whole.

If one of the larger units in the industry—such as the one with which you are identified—can justify the broadcasting of quotations three or four hundred miles further, from its mill than it ever heretofore has made either quotations or shipments, and to which territory it does not expect to make any shipments—the quotations being made simply for the purpose of compelling another manufacturer, legitimately and properly serving that territory, to sell his product at a much lower price than he otherwise would—then I can see no very good reason for maintaining an Association, nor to further attempt any active cooperation with such units.

Frankly, I cannot make myself enjoy the idea of any other company giving away my money, not only without saying "by your leave", but without a commercial grievance of any kind against us that would in any sense justify such action. (Com. Ex. 1195-A, B)

On April 18, 1931, L. T. Sunderland, president of Ash Grove, wrote to Charles Boettcher, who controlled the respondents composing the "Ideal" group, referring to "this cement market debacle" and stating in part:

My present conviction is that the five or six interests which apparently observed the published market at the recent Oklahoma bidding, should get together as soon as possible and organize, for mutual protection and to map out a constructive program. Until at least a few of us can present a solid front and have something constructive to offer, I feel any individual efforts to try to placate our belligerent Eastern friends would be futile at this time and might longer delay market recovery.

On account of commitments I cannot readily change, I

shall be away the greater part of next week; but if it is agreeable to you and your mind reacts favorably to the above suggestion I shall be very glad to try and arrange such a conference at Kansas City at the earliest date after my return as may best suit your convenience. (Com. Ex. 2245)

On May 28, 1931, Charles Boettcher wrote Frank Powell, president of Southwestern, in part:

I wish you would give me some idea as to what success you people had at the New York Meeting, and whether anything will be done in the near future. As you know, we have this $1.00 base at Ada and also at the Nebraska plant and I am extremely anxious to have this taken off if it can be done, so if you people have a meeting in the near future, I would like to attend it, or help all I can. Of course, I don't want to go to New York, but if the meeting is in Chicago or this side of Chicago, I will be glad to attend, if you want me to. (Com. Ex. 2248)

On June 5, 1931, Charles Boettcher wrote to B. H. Rader, vice president of Lehigh, stating:

As I wired you May 29, I went to Kansas City last Monday and returned here Wednesday. We had a pleasant meeting in Kansas City; there were only a few present and everything went off very nicely, but, at the same time, I can't see that we accomplished much. No doubt, you heard all about it from Mr. Norcross, as he represented the committee of twelve appointed to see the various people. We have agreed to join the Association, under certain conditions which could easily be complied with.

When I saw you in Chicago, you said you would do what you could to take off the base at our Ada plant. I am very anxious, Mr. Rader, to have that done and I believe, with your help, it could be done. Will you not kindly advise what you can do for me and when I may look for a change in conditions, that is, when we will have the privilege of putting our own base on our mill. This is not asking a great deal, as your putting a base on our mill does not help you at all and it injures us very much. Will you not please see what you can do for us, and I certainly will be glad to return the compliment. (Com. Ex. 2249)

On August 13, 1931, L. T. Sunderland, president of Ash Grove, wrote Charles Boettcher, president of the Ideal Cement Company:

After leaving you today I tried to reach Hiram by phone

but was unsuccessful, and therefore sent him a personal note, copy herewith, so he could shape his plans accordingly.

I think it leaves the matter in excellent shape since it will allow Hiram time to develop the phases of the situation which he was delegated to try and get straightened out as far as our districts are concerned. In the meantime none of us will be paying addditional dues which, we all agree with you, none of us should pay unless, and until, the principle is recognized that each company has the exclusive right to determine its own maximum selling (base) price at its own mill. (Com. Ex. 2257)

A copy of the note referred to in the above letter, addressed to Hiram Norcross, reads in part:

After you left I had an opportunity to further discuss the situation with Mr. Boettcher, who authorized me to say his companies would join the others represented today in making application to join the P.C.A., effective January 1, 1932, without attaching to the application any conditions, but with the understanding nevertheless (among ourselves only) that if matters mentioned are not in the way of being straightened out before the annual meeting in November (when the amendments are to be submitted), the applications may be withdrawn. (Com. Ex. 2258)

(f) An examination of the details of the imposition of an involuntary base is further illustrative of the practice. Marquette, with a mill at La Salle, Illinois, and a non-base mill at Cape Girardeau, Missouri, where it had the benefit of water transportation, frequently departed from formula pricing, and particularly in sale for delivery at locations where it would derive a high mill net. The president of the Cowham Engineering Company, manager of several respondents, wrote the president of one of these on May 6, 1929, stating in part:

A 60¢ Cape Girardeau base, I understand, was very narrowly averted last week. This has been brought about by Marquette and I am not at all sure it will not be the base price there before the Summer is over. • • • (Com. Ex. 2379-B)

In bids to the Indiana Highway Commission on November 19, 1929, there were 15 bidders, all of whom except Marquette bid according to the multiple basing-point delivered-price formula. Marquette bid according to the formula at

58 destinations, but bid below formula prices at 32 destinations and was low bidder by a few cents at each of these. It was partially out of line on other bids, and on November 26, 1930, Alpha put an involuntary base of $1.35 net on Marquette's Cape Girardeau mill, a reduction of 10¢ per barrel, and on December 1st reduced this involuntary base by 10¢ per barrel, making a total reduction of 20¢ per barrel. Alpha explained this action by stating that Marquette had made "Special prices to paving contractors later met by Missouri Portland" (Com. Ex. 975-4L). The economic situation was worsening as the depression advanced and departures from formula prices were becoming more frequent. On March 13, 1931, the vice president and manager of the Davenport mill of Dewey wrote F. E. Tyler, president of that concern, in part:

> Illinois is taking bids again on March 26, and I am wondering what will happen. If somebody could get Marquette in line to bid with the rest there would be a chance of the awards being made. As long as Marquette continues to cut and take all the business, I doubt if the State will make awards, * * *. (Com. Ex. 2178)

By the latter part of May 1931 the Cape Girardeau involuntary base price had been reduced to $1 per barrel net. On August 13, 1931, the president of Dewey wrote the manager of the Davenport mill of that company in part:

> This will acknowledge your letter of August 12th advising the Marquette Company are making deals of 10¢ off to practically all lineyard lumber companies.
>
> The above practice has of course been chronic with them during a long period of time. * * * (Com. Ex. 2185)

When price stability was being approached in some other areas in 1932 on the basis of advanced prices, Lone Star on June 3, 1932, reduced the involuntary base at Cape Girardeau to 75¢ per barrel net. The minutes of a meeting of the board of directors of the Portland Cement Association for July 12, 1932, show the following:

> Joseph S. Young reported that he had, with Mr. Rader, interviewed T. G. Dickinson of the Marquette Cement Manufacturing Company, who agreed to take membership in the Association effective July 1.
>
> President Mehren reported that he had been in communication by telephone with F. E. Tyler of the Dewey Portland Cement Company, H. L. Block of the Missouri Portland Cement Company, and C. B. Condon of the Hawkeye

Portland Cement Company, who had agreed, provided the Marquette Manufacturing Company resumed membership, to do the same thing.

F. L. Stone reported that the Universal Atlas Company would withdraw for the time being its letter of May 13 regarding the payment of dues on the production of their Buffington, Indiana, Hannibal, Missouri, and Independence, Kansas, plants.

J. B. John advised that the Medusa Portland Cement Company would withdraw its resignation in view of the action outlined above. (Com. Ex. 3005-E)

On July 16, 1932, the manager of the association telegraphed Missouri:

Wecker of Marquette just telephoned that he was mailing membership application effective July one. (Com. Ex. 3003)

On the same date Marquette increased the base price at its Cape Girardeau mill by 40¢, making it $1.15 per barrel net, and this advance was accepted within a few days by other companies operating in that area. In December 1932 Marquette made two advances of 10¢ per barrel each, thus increasing its Cape Girardeau base to $1.35 net, and these advances were accepted by other companies. Various price advances were being made at other bases from time to time, and in June 1933 Marquette advanced its Cape Girardeau base to $1.60 per barrel net. The general advances at various bases resulted in eliminating a number of the involuntary bases which had been imposed. In March 1935 the Cape Girardeau base was advanced to $1.70 per barrel net, in February 1936 to $1.75 per barrel net, and in March 1937 Marquette increased the Cape Girardeau base, to use the language in which the advance was described by Universal, "from $1.75 to $1.90 or some other figure sufficiently high to make this base price inactive in figuring delivered prices as against other base prices now in effect" (Com. Ex. 3340). Thus Marquette's Cape Girardeau mill returned to its former status as a non-base mill.

(g) The opposition to the use of punitive bases which developed among some of the respondents as a result of the numerous instances in which such bases were imposed in 1930, 1931, and 1932, found expression in the tentative draft of a code to be proposed to NRA, as recommended to the trustees of the Institute by the Institute membership

in Districts 5, 7, and 8, an area in which many punitive bases had been in posed. The provision suggested was:

Fair competition requires fair standards in the attitude of each member of an industry toward his competitor, to the end that competition may be honest, open, and fair. The following practices are not in accord with this standard and will not be used:

• • • • •

5. For a manufacturer to establish a maximum (base) price at the mill of a competitor constitutes an act of unfair competition. (Com. Ex. 828-7F, 7G)

The code as proposed to the National Recovery Administration by the Institute did not, however, contain any suggested prohibition against involuntary or punitive bases.

(h) The necessity for retaining the compelling force, both actual and potential, of punitive bases in restoring and maintaining uniform prices determined according to the multiple basing-point delivered-price formula was evidently recognized and accepted, for when the Institute in December 1935 adopted the "Compendium of Established Trade Methods and Marketing Policies," which listed many practices as unfair, punitive bases were not among the practices so listed. In fact, the president of Kosmos, one of the respondents which had been subjected to an involuntary base, prepared a memorandum dated December 6, 1935, which he submitted to B. H. Rader, vice president of Lehigh, the company which had imposed the involuntary base on Kosmos, suggesting the systematizing of the method of imposing involuntary bases. He wrote in part:

Practically all manufacturers want an adequate price for their product. Some, however, noting the great effect of volume upon costs and the great effect of a cent or two off the price on sales, try to secure both a satisfactory price and an unusual volume by small secret price cuts. So long as these cuts remain really secret (which is seldom) or so long as the great majority of competitors ignore them, such a policy is highly profitable to its followers. But it is very bad economics for the competitors not to meet the real prices: The great overproductive capacity of our industry is largely due to that policy in the past. At the same time it is bad practice, leading straight to chaos, for each manufacturer to take individual action purely on his own information or suspicions; there is too much room in

that for biased reports, personal dislikes, hasty assumptions and so forth.

What is needed is that everyone in the industry shall know that if he reduces the going price, no matter by what subterfuge, the general open price will fall to his figure and that this principle will operate with the same certainty as the law of gravity. As a first step to assure such certainty all available sources of information must be used: short of a complete audit of the books, which probably cannot be had, the consensus of opinion of the competitors directly affected is the best criterion of whether a price has actually, by any means whatever, been changed. As a second step there must be a determination on the part of the individual companies, if there has been a deliberate and intentional cut, to follow it, regardless of an apparent temporary loss by so doing. That is the price of stability and in the long run it is the cheapest way of getting stability at a fair level of prices.

A plan to carry out the foregoing might be as follows:

1. Continue reporting past transactions as under the Code and as permitted by the Supreme Court decree in the cement cases.

2. Elect from time to time a Chairman and a Vice-Chairman for each State (or subdivision of a state if found desirable) and hold regular meetings every two weeks, the days being staggered as between adjoining states. Additional emergency meetings could be had on call or the regular meetings could be reduced if the need for them were less. All companies shipping into a state would be asked to send a representative to each meeting.

3. The meeting would be a fact finding jury, each company present having one vote. Any accusation as to a lowered price would be written to the Chairman with supporting facts, anonymously, far enough in advance to enable him to notify the company suspected so that the latter might have its representative present prepared to reply. The Chairman would read the accusation and as far as possible the identity of the accuser would remain unknown in order to reduce personal feeling. After the reply and any discussion that might follow one representative for each company would vote anonymously as to whether the price had actually been changed and, if so, to what amount. In case a company accused did not attend or answer the jury would have to decide without the aid of that side of

the case. Without being bound to do so, which would be illegal, there would be a strong influence upon each individual manufacturer to guide his course by the verdict of the jury. (Com. Ex. 817-G, H)

Mr. Rader submitted this memorandum to Joseph S. Young, president of Lehigh, who commented on it in a letter to Mr. Rader dated January 6, 1936, in part as follows:

The basic principle upon which the plan is predicated is that force is the only practical stabilizer. What is meant by force, I presume, is price. As you know, I have always been firmly of the opinion that it is only through price control that stabilization can be accomplished and I agree wholeheartedly with the argument that the threat of general price reductions to meet lower competitive prices in the field is the only method that has yet been discovered to insure price maintenance.

* * * * *

To summarize, I question whether there is any difference in principle between Lehigh's conception of market stabilization and the basic theory of price maintenance outlined in the plan. However, before discussions of the plan proceed further I would like to suggest that its proponent submit an outline to his attorneys for a specific opinion. * * * (Com. Ex. 817-I, J)

(i) In at least one case failure to conform fully to the pricing and marketing practices established by respondents had results of a personal nature to executives of the company concerned. Harold S. Cree became sales manager of Aetna about 1910 and Oscar Lingeman was general manager of that company for many years. During the time these individuals were its managing officials the company, out of earnings, was able to, and did, greatly improve its original plant and build a much larger plant at Bay City, Michigan, which increased the productive capacity of the company to approximately 1,200,000 barrels annually. Aetna's sales cost per barrel was unusually low, and at a time when the average rate of production in the industry was around 23 percent of capacity, Aetna operated at about 70 percent of capacity. The controlling interest in Aetna was held by individuals residing in and near Boston, Massachusetts. F. R. Johnson of Boston, president of the United Shoe Machinery Company and an official in other companies, was also president of Aetna. Messrs. Cree and Lingeman had followed a somewhat individual course

and did not in all instances conform to the pricing and marketing practices used by their competitors. More than once involuntary bases were imposed on Aetna because of such non-conformity, and finally competitors began complaining frequently to F. R. Johnson, bringing to his attention instances of non-conformity. On October 3, 1933, Mr. Johnson wrote Oscar Lingeman, with directions that the letter be read and initialed by Lingeman, Cree, and certain other employees and thereafter returned to him, saying in part:

Referring to the conference which Harold Cree and I attended on Friday last, at which there were also present, Mr. Stone of the Universal Atlas Cement Co., Mr. J. B. John of the Medusa Company, Mr. Rooney of the Huron Company, Mr. Lucas of the Petoskey Company, a representative from the Marquette Company, and later we called on Mr. Emil Stroh of the Wabash Company.

It seems to me that the results of that conference should be a matter of record.

1. We admit that we had made a blunder when we quoted on the Government-Muskegon and Holland, Mich. jobs, March, 1933, and I promised that this will not happen again.

2. I did admit that while we quoted regularly on the Indiana letting in December, 1932, we did quote irregularly and different from the others in March, 1933, by using the Wyandotte base. The result of that bidding has been rather disastrous, as I see it.

3. It was stated that the other cement concerns could never find out definitely just what we were doing, when they called us by telephone, and that our answers were evasive. My answer to this was that we will tell them at all times how much a particular contract is for; and we are perfectly willing to tell them, if they inquire, at what price we took the order. Moreover, I stated that if we were in doubt or not clear what was going on or we sensed any trouble in the market, we would not hesitate to call up Mr. Rooney or Mr. Lucks, Mr. John or Mr. Jennings, or anyone else, and ask them about the situation, in order that we might know and not unintentionally tear down a situation. They stated that they would answer those questions promptly and freely, and we will do the same.

4. As to the Milwaukee situation and Pipkorn, that was discussed and we agreed that we should not allow a

jobber to buy a large amount of cement, with an idea that he could use it later on to burst open the market; if he did, then in future we should be careful as to how much cement we sold him, and try to control the situation. I appreciate that when a man buys merchandise and pays for it, it becomes his own and we cannot very well tell him what he shall do, but we must try to prevent a condition of this kind again.

5. We agreed that at any time, whenever we are going to enter a new territory, we would carefully survey and look over that territory, to find out what procedure should be followed, what the customs were in that particular territory, in order that we might not knowingly tear down any price structure.

So in summing it all up, I pledged my word and the word of the Aetna Cement Company that we would play the game one hundred percent—there would be no deviation from this in any way; we would be regular in quotations, fair in speech, in impressions and innuendoes, which we would expect others to be. With that general understanding, all trouble caused by chiseling will be eliminated, and we shall go on in a harmonious way. (Com. Ex. 20-A, B)

In October 1935 Mr. Cree, in a memorandum to Mr. Lingeman concerning criticisms lodged with Mr. Johnson by competitors, said in part: "This memo would suggest that we do everything that our competitors say that we should do which we know is to their benefit rather than to ours and it makes us realize that they and not ourselves, are running our business, so naturally, to put over their demands, they would hold out an increased price in cement. That is becoming smart business" (Com. Ex. 37-B). On December 13, 1935, Mr. Johnson wrote Mr. Lingeman, saying in part:

I now refer you to our policies, as dated December 6, which were read at the meeting the other day; and for your information I will say there were present at that meeting the following men:

Mr. Ben Calvin and Mr. William Storey, of the Consolidated Cement Co., Jackson, Mich.

Mr. J. B. John and Mr. Harry Lucas of the Medusa and Petoskey Cement Companies

Mr. Burt Rooney of the Huron Cement Co.,

Mr. Frank Mooney, Sales Manager of the Wolverine Cement Company,

Mr. Archie Conkrite, (who came in later), of the Universal Atlas

Mr. Jennings of the Wabash (who likewise came in afterwards)

Mr. D. C. Colburn, Vice Pres. of the Marquette Co.;

Mr. William Russell and Mr. Luck of the Peerless

Mr. F. R. Johnson, Mr. Oscar Lingeman, and Mr. Harold Cree, of the Aetna Company.

You will remember that at that meeting all things were discussed clearly.

I call your attention to the second page—first paragraph—as it was read at that meeting. Now in that first paragraph, we speak about selling to dealers. It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except into his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him.

Now this is a matter of much importance and I want you and your organization to start at once to see these people, whether it is McCall or who; and no better work can be done than to have Smullens, Sherry, Harold, and yourself if necessary, call on these people and explain the matter clearly to them, so that promised we will do, and we will; and it is up to you, Oscar, to see that it is done; and then when it is done, report to me, but this should not be allowed to drag, and Harold can report to you, as that is his line of operation, and I know he will.

The second thing to be taken up is this question of warehouse situation. • • •

After discussing warehouses under the control of a distributor named Smith with whom Aetna would continue, Mr. Johnson said:

Other concerns who have had a distributor (as Mr. Smith) have not had good results—perhaps that is because they did not have a good man; so please ask Mr. Smith to assist us in every way, so that we can build up higher prices in the market there, and in Michigan generally, because we have given our word that we will not tear down any price structure—we will build it up—and we don't care if we lose an order now and then; but we do want to sell

every barrel of cement that we can, at the full price, and no advantages to be given to the purchaser in any way—trucking or anything else; not that I think he is doing it, but I do want to have him be careful, and be careful with his men.

You know, we in our organization have made mistakes when we should not, and shame on us.

Therefore, those three places are taken care of.

Cleveland.

See J. B. John about this. Have that O.K.'d and as soon as it is arranged, write me, and ask Mr. John to write me.

Port Huron.

See Mr. Russell and get that straightened out; and when it is, and it is O.K. for both of you, write me and have Russell write me.

As you see, I have started on this thing and I am going to go through with it.

Detroit Is O.K.
Sault Ste. Marie.

Withdraw from there.

Grand Haven and Toledo.

See what you can do in both places that will be satisfactory. It may be wise to withdraw from both places.

* * * * * *

I shall hope and expect that you will get right to work at this immediately. I believe it is the intention of you and Harold to work in accordance with my plans as laid down; in fact, I might say that it is very decidedly essential for your future value to this organization to do so, and I don't believe you will disappoint me. (Com. Ex. 45-A, B, C, D)

In the spring of the following year a new dispute arose between Wabash and Aetna and a punitive base was again imposed at Bay City by Wabash in June 1936. Mr. Crapo of Huron wrote to Mr. Johnson on July 9, 1936:

I told Lingemann, at the time of our talk, that I was scheduled to leave within a day or two for the 50th Reunion of my Yale College class. I thought at that time that it would be possible for me to come back via Boston.

Before, I left, the Wabash had dropped the base at Bay

City. Such incomplete knowledge as I have of this incident, led me to believe that Cree had high-jacked a Wabash contract in a manner similar to one taken away from the Wabash a year or two ago, and that the result at this time was the same as before; i. e., the Wabash dropped the base. In the previous instance, the big brothers in the Cement Industry interested themselves in the matter, and accomplished a reconciliation which restored the base price.

It was my belief that you would be so busy on this matter, that it was not a favorable time to go to Boston to discuss the general situation.

It is too bad that Cree made this move, especially after his previous experience. (Com. Ex. 909)

A few days after this, Mr. Johnson went to Detroit, discussed the situation with competitors, and then obtained the resignation of Mr. Lingeman and discharged Mr. Cree. Mr. Ben Calvin, present as a representative of Consolidated at the conference on December 6th, mentioned above, was then placed in charge of Aetna. Mr. Calvin proceeded to conduct the affairs of Aetna in a more cooperative manner, frequently discussing policies and prices with competitors. In a report to Mr. Johnson dated May 7, 1937, Mr. Calvin stated: "* * * we are now merchandising our cement according to the ethics of the industry" and explained that this involved the employment of additional salesmen because he was "in the process of getting business on a new basis" (Com. Ex. 97-A, B).

Paragraph Eleven: (a) From time to time various developments have occurred which threatened to disrupt the operation of respondents' method of maintaining uniform delivered prices by means of the multiple basing-point system and common freight rate factors. One such development has been the desire of some dealers, contractors, and other purchasers to utilize motor trucks for the transportation of cement from respondents' mills or warehouses to destinations within a reasonable distance, particularly where such transportation may be more economical than shipment by rail or where direct delivery to a job by truck is more convenient, as well as cheaper or at least not more expensive than rail shipment, or where purchases of less than a carload quantity are desirable. It is obvious that if a purchaser is allowed to take delivery at the mill in trucks owned or controlled by him, the seller loses control of the destination price.

(b) The trucking of cement began about 1920. At first it was the general practice to sell cement f.o.b. trucks at the mill at the delivered price applicable to the buyer's destination, less the rail freight to that point. Purchasers quickly realized various advantages from trucking. Many of the respondents also recognized the advantages of trucking to the purchaser, but also began to recognize the effects which it had upon the uniform delivered-price system and began to examine and consider the relative advantages and disadvantages of their individual positions with respect to the trucking of cement in comparison with the positions of their competitors. Finally, around 1929 and 1930, the respondents, through cooperation, understandings, and agreements among themselves and with other interested groups, began taking active steps to eliminate, discourage, and control the trucking of cement. The primary reason for this activity by respondents was the destructive effect of trucking upon the delivered-price system. There is testimony by some of the respondents stating objections which they had to trucking, such as added handling and loading expense, difficulty of providing loading facilities, dangers arising from trucks moving around their plants, and similar reasons. However, numerous respondents stated their reasons for making changes in their trucking policies prior to the issuance of the complaint herein. This was done in response to a questionnaire sent to Institute members by Professors Clark and Burns in the course of the study undertaken by them for the Institute in 1934 and continued in 1935, 1936, and 1937. Among the reasons given for eliminating, penalizing, or restricting trucking were the following. Lehigh said in part:

The manufacturer, striving to figure his prices on indeterminate and fluctuating trucking rates and to meet the equally fluctuating and indeterminate rates from his competitors' plant, quickly found himself engaged in blind, reckless and destructive competition. (Com. Ex. 969-14M)

Alpha reported in part:

We could not control the deliveries and the many trucking prices disrupted our entire marketing and price structure. (Com. Ex. 968-8I)

Lone Star reported in part:

Unsatisfactory marketing conditions due to indiscriminatory trucking * * * To protect our rail markets in the trucking zone from possible arbitrary rail price es-

tablished by distant competing mills to meet this truck competition. (Com. Ex. 969-3V)

Trinity reported in part:

Because of uncertainty of price at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable. (Com. Ex. 967-17G)

Universal reported in part:

* * * therefore we had no control of the delivered price at destination and could not prevent the disruption of marketing practices at destination. (Com. Ex. 968-4H)

Lawrence reported in part:

Our business has been built on a delivered price basis and when we were selling to buyer's trucks at the mill our whole price structure within a trucking radius of the mill was jeopardized. (Com. Ex. 969-6P)

Many other respondents gave similar reasons, and there is other evidence of a substantial character that the effect of trucking on prices and distribution was the motivating cause of respondents' action with respect to trucking cement.

(c) One of the earliest restrictive steps taken, as shown by the record, was the addition of a 15¢ per barrel charge to the mill base price for delivery to trucks at the mill. On July 25, 1929, the sales manager of Penn-Dixie wrote to the then president of that company, Blaine S. Smith:

A plan is being developed to improve the trucking situation, particularly in the Lehigh Valley.

I understand this morning that the plan as now contemplated puts in a minimum price f.o.b. destinations of $2.44 cloth, and a price f.o.b. trucks at all mills in the Lehigh Valley and New Jersey districts of $2.40 cloth.

I will have additional information for you on this subject next Tuesday. (Com. Ex. 2853.)

By September and October of the same year the Lehigh Valley and New Jersey mills had in effect a 15¢ per barrel differential against delivery to trucks at the mill. This penalty of 15¢ per barrel for delivery to trucks at the mill did not spread immediately to the Midwest, principally because Universal did not install the charge at its Buffington mill. On November 19, 1929, an official of Southwestern telegraphed from Chicago to another official of that company, stating in part:

VERY QUIET MEETING LIGHT ATTENDANCE ESTABLISHING TRUCKING BASIS OUTLINED KLUGSTON LETTER DOES NOT HAVE SUPPORT IMPORTANT MILLS BUFFINGTON REFUSES ADD FIFTEEN CENTS TO MILL PRICE FOR TRUCK DELIVERY USELESS ATTEMPT CHANGE TO NEW BASIS UNDER THESE CONDITIONS (Com. Ex. 1270-A).

Subsequently, however, Universal did impose the 15¢ premium on truck delivery at its Buffington mill.

(d) Various plans were used by respondents in different localities to discourage or control trucking. Some of these are indicated in a letter of June 16, 1933, from an official of Lone Star to the sales manager of Aetna:

Our company has perhaps the greatest number of plants located close to large consuming centers, and our company is probably better equipped for truck deliveries than any other company in the industry. Yet we have found it absolutely impossible to evolve any plan, and we have tried many, which will permit the use of trucks as a medium of transportation in their present uncontrolled state without seriously affecting our price structure or our earning capacity.

The so-called "Oswego plan" or "Cleveland plan," while not perfect, at least offers a minimum of difficulty as compared with the other plans which have been tried in the past. At Cleveland, for instance, trucking is limited to one county and the price delivered by truck is 5¢ higher than the price f.o.b. cars. Within the limited area of Cuyahoga County, into which trucking is limited from Cleveland, and Lucas County, where trucking is limited from Toledo, the 5¢ surcharge closely approximates the actual cost of moving cement from the nearest rail siding to any destination within the county. The same is true, to a lesser extent, however, around Oswego, yet at Oswego the condition is not so aggravated as to prevent the carload shipper from closely approximating the competition offered by those operating on a trucking basis and makes it possible, to some extent, for the carload shipper to compete without destroying the natural advantage which the local mill or silo should enjoy.

As we have previously stated, this plan is not by any means perfect. There is only one way in our opinion to solve the problem and that is to eliminate trucking en-

tirely until such time as the truck is subject to regulation as a common carrier. (Com. Ex. 422-E.)

(e) Organized dealers began to oppose trucking because of fear of losing business through direct sales by manufacturers and because of keener competition which resulted among dealers if one dealer was able to deliver cement at a lower price through trucking, and other dealers could not or did not want to truck cement; or for other reasons desired to preserve the conditions existing under rail delivery. While the trucking problem was acute in 1931, W. W. Campbell, president of the National Builders Supply Association promoted a conference of interested parties which was held in New York City on July 22, 1931, and was attended by D. H. McFarland, then president of the Institute, and officials of various railway companies and railway associations. The purpose of the meeting was to discuss means of eliminating or controlling the trucking of cement. In a letter to Mr. McFarland dated July 18, 1931, Mr. Campbell included a postscript:

At this meeting I shall make a brief introductory remark, stating the purpose of and reason for calling the conference, then call on Holway to go more into detail. Afterward I shall call on you to give the Mfrs. angle. (Com. Ex. 1470.)

Mr. McFarland was called upon at the conference, as set out in the Campbell letter. At this conference it was arranged that railroad representatives would confer with cement manufacturers located on their respective lines. This was done, and some of the results are indicated in the following extracts from letters. J. L. Eysmans, vice president of the Pennsylvania Railroad Company, on August 26, 1931, wrote R. N. Collyer, chairman, Traffic Executive Association—Eastern Territory:

With the exception of the Green Bag Cement Company, Pittsburgh, Pa., with which organization the P. & L. E. is endeavoring to arrange conference, the cement companies assigned to us, as per your memorandum of July 27th, have been interviewed with the following results:

Universal Atlas Cement Company:

President B. F. Affleck, of this concern, was interviewed at Chicago on the 7th instant and corroborated the statements made by Messrs. Campbell, Holway and McFarland at the New York conference on July 22nd as to the in-

jurious effect that trucking is having on the cement industry. Mr. Affleck stated that if there is any reasonable indication that the other manufacturers are willing to discontinue the use of trucks or put on a 15¢ differential in those instances in which trucks are used, his company is willing to cooperate.

Bessemer Portland Cement Company:

Representatives of the P. & L. E. and P. R. R. conferred with Mr. J. L. Dankel, Sales Manager, and Mr. G. T. Peterson, Traffic Manager of this company at Youngstown, O., on the 13th instant, in the absence of Vice President Schmutz. These gentlemen expressed themselves as being heartily in accord with the position of the New York conference on the 22nd ultimo and stated that they have been actively interested in the elimination of trucking in the Youngstown district.

* * *

They further stated that dealers will not object to this as there is great danger under present conditions of their being eliminated altogether through delivery by trucks direct from mills to consumers.

* * *

Hercules Portland Cement Company:

Mr. MacCarey, Traffic Manager of this company, was interviewed at Philadelphia on July 23rd and stated that while they were compelled to buy four trucks and trailers several years ago, that with the establishment of short haul rates in Trunk Line territory and also due to understanding with the other cement companies, they laid up their trucks and trailers about a year ago and have not trucked one ton since nor do they propose to do. He stated, however, that they had a few cases of outside trucking companies coming to their plant and purchasing a few bags of cement but it was only for odd lots and did not amount in the aggregate to one carload per month.

Mr. MacCarey expressed his hearty accord with the contemplated program and promised his sincerest cooperation. (Com. Ex. 1149 A-B.)

On August 31, 1931, Mr. Eysmans again wrote Mr. Collver concerning a conference with officials of the Green Bag Cement Company of Pennsylvania, including A. P. Meyer, and said in part:

Mr. Meyer will make no commitment to discontinue the use of truck transportation, but indicated that if this is

done it will be the result of an understanding within the cement industry rather than through the intervention by the National Building Material Dealers Association or the railroads. (Com. Ex. 1150.)

On September 11, 1931, C. J. Brister, vice president of the New York Central Lines, wrote Mr. Collyer:

The Wyandotte Cement Company, Wyandotte, Mich.; Huron Cement Company and Peerless Cement Company, Detroit, Mich., have been interviewed with the following result:

The Peerless Cement Company stated they endeavor to ship via rail at all times, but are confronted with competition created through trucking on the part of other cement companies.

The Wyandotte and Huron companies expressed their desire toward confining their trucking operations to within a radius of twenty-five miles of their plants, but they likewise are affected by general trucking conditions. * * * (Com. Ex. 1152 A.)

On September 23, 1931, Mr. Brister again wrote Mr. Collyer, supplementing his previous letter:

* * * Mr. H. F. Jennings, Secretary and General Manager of the Wabash Portland Cement Company, who have a plant at Osborn, Ohio, was interviewed, and he stated he was heartily in favor of the use of railroads, instead of motor trucks, for his shipments.

Mr. W. J. Jennings, General Manager of the Southwestern Portland Cement Company, who also have a plant at Osborn, was likewise interviewed, and he stated they were endeavoring to discourage their dealers specifying truck service, and in order to bring this about, they are adding 15¢ per barrel on movements via truck over their prices for shipments via rail. (Com. Ex. 1153.)

Representatives of the Central Railroad Company of New Jersey, the Reading Company, and the Lehigh Valley Railroad, reporting to Mr. Collyer under date of September 3, 1931, stated:

The undersigned had a conference with Colonel E. M. Young, President, Lehigh Portland Cement Company, at Allentown, Pa., on August 12th. We discussed the question raised by the National Building Material Dealers Association at considerable length and Colonel Young, with reservations due to competitive conditions in the

trade at certain points, assured us of his desire to cooperate with the railroads and the Building Material people. (Com. Ex 1146.)

On September 3, 1931, John Duffy, vice president of Lehigh Valley Railroad Company, wrote Mr. Collyer in part:

This is to advise that I have called upon Mr. Blaine S. Smith, President of the Pennsylvania Dixie Portland Cement Company, and Messrs. C. L. Hogan, Executive Vice President, and H. C. Koch, Vice President in charge of Sales of the International Portland Cement Company [Lone Star]. * * *

Mr. Smith of the Pennsylvania Dixie Company manifested a sympathetic attitude toward the Building Supply Dealers with respect to the position they have taken in this matter. On the other hand, he felt that the best way to control the situation was the marking of an arbitrary charge on all cement loaded on trucks at the mills. As you are aware, there has been an agreement among the cement companies to make a charge of 15¢ a barrel in this connection, but I am told that all the companies have not strictly adhered to the agreement.

Messrs. Hogan and Koch expressed an attitude similar to that of Mr. Smith and asserted that they were not using trucks in the East, and at their mills outside of Eastern territory, they were loaded only when competitive conditions demanded. (Com. Ex. 1145.)

On August 3, 1931, J. H. Day, vice president of the Nickel Plate Road, wrote Mr. Collyer in part:

Have talked to Mr. George Cole, Traffic Manager of the Medusa Portland Cement Co., Cleveland, and he has definitely stated to me that the Medusa Portland Cement Co. will be glad to discontinue trucking, if the other cement companies will agree to do likewise. (Com. Ex. 1144.)

(f) On November 23, 1931, E. J. Holway, one of the participants in the conference of July 22, 1931, wrote J. L. Eysmans, vice president of the Pennsylvania Railroad, in part:

A meeting of cement manufacturers was held at Chicago on November 17, 18, and 19. Realizing that the larger manufacturers would undoubtedly travel Sunday night, I arranged to be in Chicago on Monday, the 16th, and visited a number of them, especially the larger ones, leaving the thot with them, how far the legitimate dealer would go along to correct the trucking evil.

I understand that the Universal and Basic, of Pittsburgh, will close their plants to trucks on December 1, and I think the Ohio plants will have a meeting the latter part of this week, and I believe it will be the unanimous opinion of all the Ohio manufacturers that they should follow the Pittsburgh lead, so that I think all plants in Eastern Pennsylvania and all of Ohio, will be closed to trucking by not later than December 31, 1931. * * *

* * * * * *

You can readily understand there is no copy of this kept in my files and I would kindly ask that you destroy it. (Com. Ex. 1348-A, B)

On November 27, 1931, Universal announced:

In accord with expressed desires of dealers in Pittsburgh District, effective December 1, 1931 platforms at our mill, Universal, Pa., and at our Homestead Packing Plant will be closed to all trucking except uncompleted contracts made on a trucking basis prior to that date. (Resp. Ex. 2519)

On May 4, 1932, A. P. Meyer of Green Bag of Pennsylvania wrote to Eugene Morris, president of the Central Freight Association, in part:

In November of last year we agreed to discontinue the trucking as of December 1st, at Neville Island, this agreement to continue until July 1, 1932 with the understanding that certain things be corrected in the meantime. * * * (Com. Exs. 2260; 1043-B)

On January 7, 1932, a conference was held in Philadelphia, Pennsylvania, attended by W. W. Campbell and E. J. Holway of the National Builders Supply Association, D. H. McFarland, president of the Institute, and representatives of a number of railroad companies, the minutes of which read in part:

It was stated that in southern Ohio and western Pennsylvania substantially all of the cement traffic had been returned to the rails, and that initial steps had been taken having in view like results as to shipments from the lake front district, centering principally at Buffalo, Cleveland, Toledo, Detroit and Chicago. (Com. Ex. 1043-4T)

On January 11, 1932, R. A. Williamson, assistant freight traffic manager of the Nickel Plate Railroad, wrote Eugene Morris, chairman of the Ceneral Freight Association, in part:

Cement producers in the entire State of Ohio, with the exception of the northern part of the State, have reached an agreement as far as concerns stabilization of prices, the result of which means that the movement of Cement by truck will be discontinued.

The producers in the northern part of the State, which will include Castalia and Toledo, O., have not as yet reached an agreement but it is hoped that they will do so shortly. (Com. Ex. 1043-4V)

(g) The preparation and promulgation of the NRA Code for the Cement Industry afforded respondents an opportunity to consolidate their position with respect to trucking. Section 18 of Article IX of the Code declared it an unfair method of competition:

knowingly to ship cement by any transportation agency which makes payments or concessions by rebates or otherwise for the purpose or with the effect of inducing or influencing the sale or purchase of cement. (Com. Ex. 560, p. 18)

Respondents included the same provision in identical language, except for the substitution of the words "industry products" for the word "cement," as Section 10 of Article V of the "Compendium of Established Terms and Marketing Methods" issued after the Schechter decision. On September 23, 1937, a representative of Universal reported to his superior that trucking was being done from cement plants in Houston, Texas, and commented, "I thought this wasn't in the rule book" (Com. Ex. 1941). And thereafter, on September 28, 1937, another representative of Universal was instructed to "dig into this and find out all you possibly can about it" (Com. Ex. 1940).

(h) The effectiveness of the movement to control the trucking of cement is shown by the answers of 117 mills of respondents to the Clark and Burns questionnaire previously mentioned. The meaning of the answer by 1 mill is not clear, and of the remaining 116 mills reporting, the status of trucking was approximately as follows: 85 mills reported no trucking permitted under any circumstances; 8 reported trucking permitted, but a penalty in the form of an addition to the price was imposed; 5 reported trucking permitted at full rail destination prices, but 2 of these were limited to trucks under the control of the mill; 1 reported trucking permitted on the basis of destination price

at the mill at times, and at other times the addition of a 25¢ penalty to the base price; 4 reported trucking permitted, but limited to certain points; 6 reported trucking permitted at destination prices less freight; and only 7 appeared to have permitted trucking upon the basis of the applicable price at the location of the mill without any restriction. Many of the answers made to the questionnaire, in addition to showing what change, if any, was made in trucking policy, indicated the date of such change. Of the 117 mills, 21 gave no date of change of policy and 5 indicated that trucking had never been permitted. Of the remaining 91 mills, approximately 56 changed to the policies stated above in 1932; and of the others, about one half changed to such policies before 1932 and the remainder after 1932.

Paragraph Twelve: (a) As heretofore pointed out, respondents' multiple basing-point delivered-price system is directed toward the maintenance of uniform prices for cement by all respondents at any given location. Under this system, until recently, purchasers of cement generally paid the freight charges thereon directly to the railroad. This often afforded an opportunity for purchasers to secure cement at a delivered cost lower than the delivered price quotation in effect at the point where the cement was to be used. This was done by making a purchase at the delivered price in effect at some destination where such price included, under respondents' pricing formula, a freight factor higher than the actual freight charges to the purchaser's true destination, and then causing the railroad to divert the shipment to the true destination. Such diversions in transit did not change the amount received by the seller from the amount he would have received had the diversion not been made (though not the same amount as he would have received had the purchase been made on the basis of the delivered price in effect at the buyer's true destination), but the purchaser, after paying the actual freight to the railroad, received the cement at a delivered cost lower than he could have secured by purchasing at the delivered price in effect at his true destination. This interfered with respondents' desire to maintain uniform delivered prices at each destination, and they undertook, by means of understandings and agreements, to prevent purchasers making diversions in transit.

(b) The "Code of Ethics" adopted by respondents when the Institute was organized contained a provision prohibiting diversions in the following language:

For manufacturers to divert, or to permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is discriminatory as between purchares or users, and is therefore an unfair trade practice. (Com. Ex. 138-S)

The Institute included a provision in the code which it proposed to NRA similar to that which appeared in the "Code of Ethics" quoted above, and the NRA Code as approved contained a provision making it a violation of the Code:

To divert or permit purchasers or users of cement to divert shipments of cement from one destination to another destination, the result of which will enable the purchaser or user to secure cement at less than the member of the industry's published market price at the point of final destination. (Com. Ex. 557, p. 338)

The "Compendium of Established Terms and Marketing Methods" approved by the trustees of the Institute after the expiration of the NRA Code contained a similar provision declaring the following to be an unfair method of competition:

Diverting or permitting the diversion of shipments of Industry Products, the effect of which will be to enable a purchaser or user to secure Industry Products at variance with Member's published price-terms for point of final destination. (Com. Ex. 561)

The Compendium also recommended the use of a standard form of sales contract which provided that in the event a buyer diverted a shipment of cement he would pay the seller's price applicabl at the place of final delivery. This provision reads:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has

been used by Buyer for any other purpose than the purpose above specified; * * * (Com. Ex. 561, p. 21)

(c) Under respondents' pricing formula it was the practice to quote delivered prices which included freight charges. When a shipment was invoiced to a purchaser, the total amount was ordinarily shown on the invoice and the amount of the freight charge was also stated separately. The purchaser paid the freight charges to the carrier and remitted payment for the balance of the invoice to the seller. The Institute approved a recommendation for a change in this practice, as shown by the minutes of a meeting on December 13, 1929:

Mr. Storey brought up the question of the application of Paragraph 14 of the Code of Ethics. After discussion, on motion of Mr. Kind, seconded by Mr. Storey, it was recommended that in order to prevent diversions in violation of Paragraph 14 of the Code of Ethics, it is desirable that no freight allowances be shown on manufacturers' invoices and that the following notation appear on all such invoices: "Freight allowance does not appear on invoice. Receipted freight bill showing payment of freight charges to destination shown on Bill of Lading will be accepted as part payment of the invoice." (Com. Ex. 136-X)

On January 3, 1930, Luther G. McConnell, then manager of the Institute, telegraphed Hercules concerning this recommendation:

Companies Generally Following Recommendation In Southwest Territory Stop Northeast Territory Still Under Discussion (Com. Ex. 141-5)

In general, respondents were not successful in inducing purchasers to send the receipted freight bills with their remittances, and with a few exceptions respondents did not continue to require receipted freight bills before allowing credit for freight payments made by purchasers.

(d) Traffic representatives of a number of the corporate respondents, in their association on the committee on transportation of the Portland Cement Association and otherwise, worked upon the problem of inducing the railroads to accept bills of lading stamped with a prohibition against diversion without the shipper's consent. In testifying about this, F. M. Coogan, president of Alpha, said in part:

Q. Now, referring again to this matter of diversion in transit, would your traffic manager, Mr. Apgar, work

with traffic managers of other cement companies in inducing the American Association of Railroads to accept the stamp on bills of lading regarding diversions?

A. Yes, sir; I think he did.

Q. Do you draw some distinction between your company working with competitors in some such way as that and understanding or agreement between them?

A. I certainly think that we have a perfect right to act with our competitors on anything that will improve or bring about a better freight rate and freight service situation at our mills.

Q. Well, did the stamp restricting diversions come within the category you just named?

A. I think it does, yes.

Q. In what way?

A. Well, it puts a certain moral obligation on the railroads not to divert shipments without the approval of the shipper, and inasmuch as we sell at delivered price we feel that we have a perfect right to control the shipment until it reaches destination, (T. 24626)

In March 1935 the traffic advisory committee of the Association of American Railroads recommended the acceptance of bills of lading stamped with a clause prohibiting diversion, and this privilege was availed of by many of the respondents. In a letter to numerous competitors dated December 18, 1935, the traffic manager of Penn-Dixie stated:

As information, the Traffic Executive Committee of the Association of American Railroads at their meeting on March 14, 1935, under Topic #24 approved the acceptance of bills of lading by the railroads bearing notation reading as follows:

"This is the property of the shipper and no reconsignment of diversion is to be made unless authorized by the consignor."

This notation has been stamped on the bills of lading covering shipments moving in the east since the middle of last May and has worked out very satisfactorily. Therefore, if you desire you can tender your bills of lading bearing the same notation.

It would be well if you should desire to use this notation to notify the railroads serving your mill of your intention so as to initiate a smooth working arrangement. (Com. Ex. 584-G)

In writing the traffic manager of Lehigh in July 1936 concerning approval of the stamp on bills of lading prohibiting diversion, the freight traffic manager of the Pennsylvania Railroad said in part:

Under advice of Trunk Line Counsel, however, should a consignee request a diversion, the carriers are obligated under their tariffs to ascertain who the real owner is and comply with his instructions. (Com. Ex. 749-A)

(e) In July 1930 the Institute recommended to its members that their contracts of sale for cement include "A loss and damage clause protecting Seller from liability after delivery to common carrier or against any other loss occurring in transit or storage" (Com. Ex. 153-P). The actual performance of respondents with respect to claims for loss or damage in transit was not entirely uniform. Some respondents declined to assume any responsibility for such loss or damage; some respondents did assume such liability; and other respondents undertook to secure adjustments of freight overcharges or claims for loss or damage in transit for and in behalf of their customers. Over a long term of years respondents have shipped cement to purchasers without prepaying the freight charges and purchasers have paid such charges directly to the carrier. Respondents have, until quite recently, opposed in organized fashion the prepayment of freight charges, except where shipment was made to a point where the carrier required that charges be prepaid or some unusual condition existed which made prepayment desirable or necessary. Beginning about January 1937, increasing numbers of respondents added to the provision in their terms of sale for the payment of freight charges by the purchaser directly to the carrier an additional provision that such payment be "for the account" of the seller. In practice, there was no accounting between the carrier and the seller respecting the payments received from purchasers, and the procedure of the parties pursuant to this provision was not different from what it previously had been. Some two years after the issuance of the complaint in this proceeding the corporate respondents generally began prepaying the freight charges on all shipments of cement. When freight is prepaid, there can be no diversion of shipments by the consignee to his advantage in price.

Paragraph Thirteen: (a) For many years it has been customary for the corporate respondents to contract with

dealers or contractors for the delivery of a specified quantity of cement at a specified price over a stated period of time, and these contracts are ordinarily referred to as "specific job contracts," although in practice they are merely an option granted to the purchaser. The contractor who undertakes a construction job desires to be protected against price increases until the job for which he has contracted is completed, and if he has purchased cement through a dealer, the dealer desires similar protection. This practice presents the possibility that the dealer, and perhaps the contractor, may contract with one or more manufacturers for more cement than is needed for a specific job, and if the price of cement should advance in the meantime, the purchaser may take the excess amount of cement at the lower contract price and resell it or otherwise use it to his advantage or profit. When this occurs, it affects the respondents' ability to control the delivered price of cement and tends to disrupt the market and break down the uniform delivered price established pursuant to the multiple basing-point formula. In order to prevent such interference with prices and marketing practices, respondents have engaged in the cooperative checking of such contracts and have taken collective action to effect their cancellation. The articles of association of the Institute provided for the collection and dissemination of "Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement." (Com. Ex. 138-B).

(b) The interest of respondents in the cancellation of specific job contracts for excessive quantities of cement was largely limited to periods immediately following an advance in price. It was at such times that respondents' interest was most actively expressed. This limitation upon the value of contract checking was recognized by the Institute. In a memorandum describing the activities of the Institute, its general manager, George H. Reiter, wrote in part:

> The Institute's present method of filing and reporting contract information is undoubtedly of less value than during a period of a rising market. (Com. Ex. 595-E.)

(c) The effect of these contracts upon respondents' prices for cement was not a new problem. The report of the committee on trade conditions published in 1915 by the Association of American Portland Cement Manufac-

turers, of which some of the respondents herein were members, in discussing this subject, stated in part:

Urging dealers to place orders for extended delivery for specific work, and permitting such dealers, at their option, to take more or less cement on such orders than actual quantity used in the work, has been one of the most objectionable devices and practices known, and has done more than any other one thing to bring about demoralization. (Com. Ex. 3193, pp. 8, 9.)

The Portland Cement Association, in which numerous respondents herein were active at the time, published in 1919 a compilation of reports of the trade practice committee "intended to eliminate unfair methods of competition," and for other purposes, stating in part:

Great demoralization results from the ability of dealers to place orders with manufacturers for large amounts for deferred delivery upon the representation that the cement is for specific work which the dealer has sold, all or part of which has in reality not been sold by dealer for such work. (Com. Ex. 3192, p. 9.)

(d) Very early in its history the Institute organized a method of checking contracts entered into by its members for the sale of cement. Such contracts were reported to the Institute daily by its members, thus enabling the Institute to determine whether there were duplications; that is, whether cement for the same job had been contracted for with more than one member, and also afforded a basis for determining by checking in the field, if necessary, whether the amount contracted for was in excess of the amount needed for the particular job. Members also reported on changes in outstanding contracts previously reported to the Institute, and a summary of the contract information was sent by the Institute to all its members. In 1930 a number of corporate respondents loaned the services of some of their salesmen as a field force to check specific jobs to determine whether the amount of cement contracted for was excessive, and the Institute also had field engineers in its employment who did like work.

(e) Having collected and furnished to its members information concerning excessive quantities of cement contracted for and duplications of contracts for specific jobs, the Institute did not then leave the matter to the independent judgment of individual members. Collective action and the pressure of collective opinion were exerted

to bring about contract cancellations. The minutes of a meeting of the board of trustees of the Institute on March 14, 1930, contain the following:

The principal subject discussed was the matter of checking contracts and cancelling any that were found to be without proper supporting evidence. (Com. Ex. 604-A.)

On April 29, 1930, William J. Jennings, an official of Southwestern, wrote another official of the same company in part:

I spent last Wednesday and Thursday in Chicago at a meeting of the Cement Institute. Each cement company representative took his contracts with him to Chicago, and it took us two days to go over all these different contracts and cancel the duplicates and come to an agreement among the different ones on what they were willing to do. (Com. Ex. 1270-K, L.)

In writing C. L. Hogan, vice president of Lone Star, on April 28, 1930, concerning a meeting of the Institute, G. E. Pierson, also a vice president of the same company, stated:

At our former meeting held two weeks ago a report was made by the secretary indicating that cancellations up to that time totalled approximately 500,000 barrels. The report at the last meeting indicated subsequent to that time and prior to the last meeting additional cancellations totalling 1,050,000 barrels had been made. During the two-day conference in Chicago it was estimated that cancellations approximating 500,000 barrels were made. There remains additional duplicated bookings to be eliminated and it looks on the face of it at this writing that when the slate is finally cleaned there will have been canceled somewhere in the neighborhood of 2,500,000 barrels. This, I think, speaks well for the work of The Institute and indicates very definitely just how effective this work can be made if it is properly supported by the membership. (Com. Ex. 1018-A.)

(f) During the NRA Code period the standard form of specific job contract annexed to the Code approved in 1933 contained, among other provisions, the following:

Buyer represents the aforesaid number of barrels of cement will be used in the construction of the above-described work and agrees that no portion of such cement will be used for any other purpose without the written consent of Seller. If any of the cement shipped hereunder

is * * * used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as * * * has been used by Buyer for any other purpose than the purpose above specified; * * *. (Com. Ex. 557, p. 349.)

The amended NRA Code for the Cement Industry as approved May 11, 1935, contained a provision requiring the filing with the Code Authority of all contracts or orders for the sale of cement, including quantity and price terms, and, further, "Upon receipt of such filed orders or contracts the agent of the Code Authority shall send digests hereof to all interested Members of the Industry" (Com. Ex. 560, p. 15). After the Code period, contract provisions similar to those quoted above were incorporated in the specific sales contract form recommended in the "Compendium of Established Terms and Marketing Methods." Collective action to bring about cancellation of excessive or duplicate contracts was also continued after the Schechter decision. On July 22, 1935, George H. Reiter, chairman of the trade practice committee of the Institute, wrote Wabash in part:

The unshipped balance on this contract as of June 30 was 6,538½ barrels and member owning this contract states that they are not shipping at this time and believe that Wabash cement is being furnished.

We find no contract of your company covering this project and inasmuch as there have been raises in price since this contract was awarded we are investigating this matter and request that you advise us whether or not you have a contract covering a portion of these requirements and have failed to file it with this office as required by Section 7, Article VIII, of the Amended Code.

Please make reply within five days of receipt of this letter. (Com. Ex. 1014.)

On July 23, 1935, the Chicago Division of the Institute wrote the Louisville Cement Company in part:

We have had our engineer check contract indicated below.

* * * * *

The store and apartment building at 4900 Glenway, the address shown above, was completed in 1929. A new building of the same type is being built at 4927 Glenway but the contractor is Harry Ledermeier. Lee Knose, the contrac-

tor listed on your contract is not connected with this job in any way.

We, therefore, believe that no obligation exists under this contract for cement. (Com. Ex. 1015-A.)

On August 22, 1935, Louisville Cement Company wrote to one of its representatives in part:

I am enclosing a letter from Bass & Co. asking us to extend the expiration date on the 1000 barrel contract for the W. B. Hudson job from Sept. 1st to December 1st. I don't know just what to do about this. Representatives of other cement companies have been investigating the three contracts we have at Clarksville and reporting to the Institute that these contracts are not legitimate and that they will require a great deal less cement than the contracts call for. The Institute has been questioning the validity of these contracts. We are on the spot concerning them.

We do not want to ruin our reputation for fair dealing in the industry, but on the other hand we want to be absolutely fair with Bass & Co. at Clarksville. We want to supply on these contracts every barrel of cement that is necessary to fill them, and if it is necessary to extend the expiration date on the W. B. Hudson contract to December 1st in order to do so, then we are perfectly willing to make this extension. (Com. Ex. 1015-B.)

On September 24, 1935, the Chicago Division of the Institute again took this matter up with the Louisville Cement Company, writing in part:

We have had our engineer check contract indicated below.

* * * * *

It is our information that Bass & Company are furnishing this cement at the old price on the Post Office job at Clarksville, so naturally, they were able to undersell other dealers, as this was bought at a lower price on these fictitious contracts.

May we have your understanding? (Com. Ex. 1015-C.)

(g) In order that the contract checking and cancellation carried out by it might appear to be the result of individual action, the Institute attempted to disassociate itself as far as possible from any public connection with the results of this activity. When a member of the Institute, one of the corporate respondents herein, wrote the Institute suggesting that summaries of contracts and cancellations be sent directly to its salesmen to save respondent

the necessity of copying information from these reports for the use of its salesmen, the Institute on March 12, 1936, replied in part:

I am afraid that it is out of order to send copies of our Daily Report to salesmen and this has never been done. The reason is that we merely send to members in this matter information for their guidance, and it is the usual practice for member companies to forward a part of this information to field men without identifying it as coming from the Cement Institute. The purpose of this procedure is to indicate the fact that the company itself is responsible for the information furnished salesmen and also to avoid the implication that the Cement Institute has any authority in the control of contract obligations. (Com. Ex. 1932.)

Paragraph Fourteen: (a) Prices which appear to be uniform may be affected by differences in the accompanying terms and conditions of sale. Standardization of terms and conditions of sale is needed to effect complete and total price uniformity. Respondents' multiple basing-point delivered-price system has been supplemented by uniformity of terms and conditions of sale brought about by collective action. The process of standardizing these terms and conditions through collective action did not begin with the Institute, although it carried forward, supported, and supplemented the uniformity previously created.

(b) The record shows that collective action to establish and maintain uniformity of terms and conditions of sale was carried on by cement manufacturers over a long period of years. At a meeting of the Association of American Portland Cement Manufacturers in September 1905, at which representatives of a number of the corporate respondents herein were present, the following occurred:

Mr. Harding (Bonneville): I should like to know how many companies are really living up to the agreement with reference to discounts to be made on and after September 1st? We all signed the report in good faith, but I understand that some companies are still making quotations covering 2 percent off in ten days, good until the end of the year.

After considerable discussion on this question the report of the Committee on Trade Conditions was read by the Secretary. (Com. Ex. 3235-Z3.)

At a meeting of the same association in December 1905,

also attended by representatives of a number of the corporate respondents herein, the president of the association called attention to a change made in the report of the Miller committee in order to eliminate therefrom the references to price and said that all members who signed the original report had, with one exception, agreed to the change. As thus modified, the agreement read in part:

Agreement To Standardize The Customs And Usages In The Cement Trade.

Whereas, We, the undersigned, Manufacturers of American Portland Cement, desire to standardize the customs and usages in the cement trade for the purpose of making all our business transactions more easy, simple, safe and economical;

Therefore, We agree as follows:

* * * * *

Concerning terms of payment: In all cases payment within thirty (30) days after date of shipment from the works to be insisted upon. A one (1) per cent discount for cash to be allowed for payment within ten (10) days from date of invoice. Invoices to be stamped "Positively no discount on this bill after ....." No discount to be allowed on freight and sacks under any conditions. This change to take effect September 1, 1905.

Concerning bags, the following recommendations are made: Bags positively to be paid for with the cement. Discount in no case to be allowed on bags or freight. Count and inspection at mill always to govern. Freight on bags to be prepaid by customers. (Com. Ex. 3235-Z6, Z7)

At the same meeting the association unanimously adopted the report of the bag committee and appointed a committee "to put that Resolution in shape for signature, and to present the same to the Association this afternoon." The report referred to reads:

I respectfully report, on behalf of the Committee on Bags, that I have communicated with all members of our association, and have received written replies, in which they express their opinion relative to the charge which should be made for cotton sacks, and also the price of their repurchase, and find that a large majority of the companies are in favor of uniform action. From this information I respectfully report as follows: "That all cotton

sacks be charged at the rate of 10 cents each, and be included in the price of cement, and when the cotton sacks, having the label of the respective manufacturers, are returned in good condition, freight prepaid, that each company repurchase the cotton sacks at 7½ cents each." (Com. Ex. 3235-Z8, Z9)

The minutes of a meeting of the same association in March 1906, attended by representatives of a number of the corporate respondents herein, show:

The reason the Association did not act upon Mr. Gerstell's motion (i. e., that the Association agree to charge 15 cents per barrel for cement in paper) was—some of the members were of the impression that if we should issue another agreement which would necessitate each member sending out a number of circulars, it would cause much comment among the dealers about the so-called "Cement Trust." (Com. Ex. 3235-Z11)

The minutes of a meeting of the same association in September 1915, attended by representatives of a number of the corporate respondents herein, contain the following:

(The report of the Committee on Trade Conditions was here presented, read and—after discussion—the recommendations approved, but since the Committee were authorized to prepare a special booklet containing their report, the same is not included as part of these minutes). (Com. Ex. 3236-Z85)

In the introduction to the publication thus authorized it is stated:

The magnitude and importance of the cement industry demand that the sale and distribution of the product be conducted upon firm and definitely fixed principles, and that doubt and uncertainty be eliminated.

It appears that the importance of this attitude is being more fully appreciated by the cement manufacturers, and that the membership is desirous of a full and free discussion of the various subjects involved in order that the consensus of opinion may be ascertained and established as custom, and so recognized by all cement manufacturers. (Com. Ex. 3193, p. 1)

Some of the recommendations made were, in substance:

1. In making delivered prices the manufacturer only guarantee cost at destination and not be responsible for shortage or damage occurring in transit; and, further, that

no sales or quotations be made subject to any specifications except those of the United States Government or the American Society for Testing Materials.

2. When cement is tested and kept in sealed bins for the purchaser, a charge of not less than 3 cents per barrel be made.

3. The use of standard forms, as per the accompanying examples, for specific job contracts, contracts with dealers, and orders.

4. Sale of the packages provided for cement on the same terms as the cement is sold, and that cloth sacks be repurchased from the original purchaser only when in serviceable condition or readily repairable.

5. No rebates or concessions in any form to be made to any purchaser or his agent.

6. Trade quotations to be limited to one car for immediate acceptance and 15-day shipment.

7. Change of the cash discount from 2 to 5 cents per barrel.

8. A statement of the conditions necessary for a purchaser to be considered as a dealer, constituting a definition of dealer.

9. No sales to a dealer for shipment to any town other than his home town except at consumer price, excepting towns adjacent to his home town where there is no dealer.

10. In quoting contractors or consumers add not less than 5 cents per barrel to dealer price.

11. No payment of commissions to dealers.

12. Price changes to be effective upon announcement.

13. No guarantees against decline in price. (Com. Ex. 3193)

(c) In 1919 the Portland Cement Association, largely composed of respondents herein, published a pamphlet containing various recommendations adopted by that association. The substance of some of the recommendations was:

1. No sale of cement subject to specifications other than those of the American Society for Testing Materials.

2. When cement is tested and kept in sealed bins for the purchaser, a charge of not less than 3 cents per barrel be made.

3. The use of standard forms, as per the accompanying examples, for dealer contracts and orders.

4. Sale of the packages provided for cement on the same terms as the cement is sold and that cloth sacks be

repurchased from the original purchaser only when in serviceable condition or readily repairable.

5. Trade quotations to be limited to one car for immediate acceptance and 15-day shipment.

6. That the 5 cents per barrel discount for payment in 10 days be continued.

7. A statement of the conditions necessary for a purchaser to be considered as a dealer, constituting a definition of dealer.

8. No sales to a dealer for shipment to any town other than his home town except at consumer price, excepting in towns adjacent to his home town where there is no dealer.

9. Manufacturers have for some years made a differential in price between dealers and consumers, first of 5 cents and later 10 cents per barrel (though in some sections of the country some manufacturers still use a 5-cent differential).

10. No payment of commissions to dealers except where clear liability for such payment exists.

11. Price changes to be effective upon announcement.

12. No guarantees against decline in price.

13. Only two classes of buyers to be recognized—dealers and consumers. (Com. Ex. 3192)

(d). Having in preceding years created substantial uniformity in terms and conditions of sale, it was not necessary to go over the same route again in minute detail when the Institute was organized in 1929. Affirmation in broad terms was sufficient, and this was given in the Code of Ethics agreed to by members of the Institute. Included in the provisions of this code were prohibitions against:

1. Selling cement except under specifications of the American Society for Testing Materials, American Standards Association, or the United States Government.

2. The payment or absorption by the manufacturer of costs for testing cement for a purchaser.

3. The use of contracts in the sale of cement which do not contain definite statements of price, quantity, terms of payments, time and place of delivery, and all other items necessary to form a complete contract. (The adoption of a standard form of sales contract by the industry was recommended.)

4. Failure to require payment of the manufacturer's published charges for packages and the making of payment or allowances for unserviceable sacks returned or for sacks of another manufacturer.

5. The granting of any form of rebate, refund, credit, or unearned discount, or special services or privileges to one customer not given to others. (Com. Ex. 138-N-U)

(e) The differential in price previously granted to dealers was wiped out in 1930 when the effects of the depression caused dealers to cut prices and pass on to purchasers a portion of the trade discount received by them. Lehigh reduced the differential to dealers to 5¢ per barrel, withheld payment until the end of the year, and made payment contingent upon the dealer's satisfactory conduct with respect to the discount. Other respondents followed Lehigh's action, but there was some division among the respondents upon this matter. In a letter of December 12, 1930, Charles L. Hogan, vice president of Lone Star, said in part:

The Lehigh Company and some of those who have joined with them have been making very strenuous efforts to bring all the members of the industry to the Lehigh selling plan. They have been successful to a marked degree, for as stated in a previous letter, the only companies in the East who have not announced that they were going to follow the plan are Whitehall and ourselves. In the Middle West Wabash, Standard Portland Cement at Painesville, Ohio, Marquette and our company are the exceptions, although Missouri Portland has also put in a modified plan which recognizes the 5¢ differential but allows deduction when the invoice is paid. They have not been so successful in the Kansas field for there all of the companies are following the old plan, with the exception of Atlas, Lehigh and Alpha. (Com. Ex. 1131-J)

Substantial dealer opposition to the "Lehigh" plan developed. Leaders of the cement industry met and discussed the situation thus created and sought to work out a basis of settlement. The final result was that no differential has been granted to dealers since 1931, and the manufacturer's price was made the same to dealers as to those consumers who are accepted by manufacturers as direct customers.

(f) Each of the above provisions in the Code of Ethics had its counterpart in the NRA Code for the Cement Industry, but such Code was by no means limited to those provisions. The cash discount of 10¢ per barrel appeared in the Code, and the standard forms of contracts annexed to the Code included the package charge of 10¢ for cloth

sacks and a refund of 10¢ for each of the seller's bags returned in good condition.

(g) The "Compendium of Established Terms and Marketing Methods" published by the Institute after the NRA Code period contained, among other recommendations, the substance of the provisions mentioned as appearing in the Code of Ethics and the NRA Code. The standard forms of contracts annexed to the Compendium provided for a package charge of 10¢ each for cloth sacks and for the refund thereof to the sellers on sacks returned in good order. The charges of 15¢ per barrel for packaging cement in paper bags and of 40¢ per barrel for packaging in cloth bags have been continued unchanged for more than 35 years.

Paragraph Fifteen: (a) With a view to maintaining a price level considered satisfactory, some of the respondents have been concerned for a long period of years with means of harmonizing production with shipments of cement. These activities have included the inculcation of a philosophy of maintaining a static condition in the production of cement to the extent of preserving the individual manufacturer's proportion of the total business and acceptance of the theory of dividing available business among producers in accordance with some predetermined formula. Respondents have, by agreement, carried on an extensive program of cooperatively collecting and disseminating detailed figures showing the production, shipment, and stocks on hand. These figures are arranged in various ways, not only including totals, but also revealing to each member of the Institute the individual figures for each of the other members. Each member was thus informed of the exact position of each of his competitors.

(b) The minutes of a meeting of the Association of American Portland Cement Manufacturers in September 1903, attended by representatives of a number of the respondents herein, show that consideration was then being given to a situation resulting from an overproduction of cement and lower prices resulting therefrom. A committee was appointed to consider a plan for overcoming these difficulties, the chairman of which suggested that they should have figures

* * * actual figures of the various mills * * * showing from month to month, stocks on hand and

the cement production and capacity of the various mills, * * *. (Com. Ex. 3235-O.)

The minutes of a meeting of the same association in March 1904, also attended by representatives of a number of the respondents herein, show that arrangements were made for the collection, compilation, and dissemination of statistics for the industry. The minutes of a meeting of the same association in June 1910, attended by representatives of a number of respondents herein, show that by unanimous agreement the statistical reports were broadened to include monthly reports of production and shipments expressed in both actual figures and percentages. In the course of a discussion of stocks on hand, production, and other data at a meeting of the same association in June 1911, also attended by representatives of a number of the respondents herein, W. S. Mallory said:

Yes, sir—that is right, from 25 to 30%; but in the meantime if we continue manufacturing at the present rate—and that is what we are doing now—if we continue making cement for the balance of the year as we are making it now, it means just one thing—trouble. (Com. Ex. 3235-Z97.)

* * * * *

Now, in regard to that, I have only this suggestion to make. * * * I cannot speak for all the companies. There is one, however, I can speak for, and that is the Edison Company; * * * We have decided on an amount of stock and clinker that we will accumulate, and the moment our shipments fall off in volume, and we have that stock on hand, that moment the Edison Company shuts down. * * * I cannot help saying that it seems to me that every company represented here could do the same thing. If they would do so, that would be a form of co-operation that would be very effective in remedying present conditions, and a plan of operations that would absolutely and effectively solve our problem of over-production for the balance of the year. * * *

* * * * *

Mr. Kelley (Virginia): Then, in your opinion, the crux of the whole matter is this: the people who have thirty days' production on hand should shut down for a time?

Mr. Mallory (Edison): Well, every one can do as they think best, but that is what we are going to do. (Com. Ex. 3235-Z100, Z101, Z102.)

(c) In September 1933, W. S. Mallory was employed by the Institute as its statistician. From 1926 to 1933 Mr. Mallory had furnished a statistical service on a subscription basis to some 50 of the corporate respondents herein and for many years prior to 1926 he had been active in statistical work designed to aid in controlling the production of cement. His first connection with this work apparently began about 1906 while he was an official of Edison. In 1932 Mr. Mallory began furnishing the figures for individual mills, including production and shipment figures, the mills being identified by key numbers known to all subscribers. The statistical service furnished by Mr. Mallory, both prior to and after the organization of the Institute, included figures purporting to show the productive capacity of each mill. These were said to have been estimated on the basis of the "three highest consecutive months' actual clinker production" of each mill (Com. Ex. 821-M). The total of these figures, however, is less than the total compiled from the individual reports of producers as reported by the United States Bureau of Mines.

(d) In a telegram sent from Chicago under date of November 19, 1929, F. H. Powell, president of Southwestern, stated to a vice president of that company in part:

Very quiet meeting light attendance * * * concensus general opinion if curtailment production could be brought about other grievances would soon be cleared up * * * (Com. Ex. 1270-A).

In writing to another official of Southwestern on January 10, 1929 (1930?), concerning an Institute meeting he attended in Chicago, W. J. Jennings stated in part:

The meeting of this Cement Institute started in the morning and we were still at it along about 8 o'clock at night, and I want to say it was probably the most intensive meeting ever held by the cement industry.

* * * * * *

Now, Mr. Merrill, this formation of the Cement Institute is going to put a different aspect on the cement business in this territory. During the meeting, Mr. Mallory, who is statistician for the Cement Institute and who has developed the amount of cement available for each plant throughout the U. S., was called upon to give the capacities of the different plants in the mid-west district. * * * He had us down at 1,500,000 barrels and he had Wabash

down at 980,000, and they called on each one of us to state if these amounts named were anywhere near correct. I told them that we could manufacture a great deal more than this and that by the end of this year our capacity would be over 2,000,000. Harry Jennings stated that they also had a 2,000,000 barrel plant or would have by the end of this year. But they would not allow him any advance. I have a promise from Mr. Mallory that he will advance no one in this district until he advises me beforehand. This Mallory was very willing to do as it was after I had been appointed to the Executive Board!

It is the idea of the Cement Institute to get all the member companies to reduce their output to 70% of the capacities allowed them by Mallory, and of course the price would then automatically go back to what it originally was, and some are talking of 40¢ over the present price. This operation on 70% capacity would continue until such time as the country was able to consume more or stocks on hand are reduced to zero. (Com. Ex. 1270-B-J.)

(e) According to Mr. Mallory's figures, the average percentage of production to capacity for 1930 for the several districts did not exceed 70 percent in any district, the closest approach being 69.9 percent in eastern Missouri, Iowa, Minnesota, and South Dakota; the same in Texas; and 69.8 percent in western Missouri, Nebraska, Kansas, Oklahoma, and Arkansas. The average percentages for other districts varied considerably but were substantially below 70 percent (Com. Ex. 2895-A-D). It is not practicable to determine to what extent this resulted from cooperation among respondents or from the effects of general economic conditions in 1930.

(f) The effect of keeping continually before manufacturers the individual production of each, and its relation to the total, aided in creating among many respondents a philosophy of sharing the available business and of not seeking too strenuously to increase their individual shares of the total. In his testimony B. A. Affleck, formerly president of Universal, said that he understood before 1930 and 1931 the futility of attempting to increase his proportion of the total business by price reductions and that others learned that lesson in those years. He also said:

Q. You think it is futile for competitors to attempt to

change their percentage of the total business that is available to the whole group?

A. I don't think my opinion as to whether it was futile or not is important. It just is futile.

Q. Well, why?

A. Because he can't get away with it.

Q. In other words, you don't think it is possible for a concern that has ten percent of the business this year or last year to make it fifteen percent this year?

A. Oh, I didn't mean to convey that idea. The fact of the matter is, our percentage of the total underwent quite a severe shrinkage. We didn't get our percentage in 1931 or two and others got more.

Q. And others got more?

A. So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out. (T. 34933, 34934.)

In a memorandum prepared in 1931 or early 1932 by Diamond and circulated by it to competitors, it was stated:

In the year 1930, according to Mr. Mallory's yard-stick, we shipped only 4500 barrels in excess to our fair share of the business, which should be a clear indication that we have not abused our position. (Com. Ex. 2662-B.)

In a memorandum dated March 9, 1934, Albert Moyer, president of Vulcanite, stated in part:

* * * our tonnage has, even from the start, been in accord with the shipments of other plants in this district. (Com. Ex. 426-P.)

In a memorandum sent by Mr. Mallory to Nazareth on April 5, 1934, it was stated in part:

First I want to try and show that the theory that it is good business to increase the volume of shipments of any company in excess of its quota share by cutting the market price in order to reduce manufacturing costs is a very costly fallacy not only for the company, but also for the entire industry, * * *. (Com. Ex. 821-E.)

In writing to the same respondent on November 15, 1933, Mr. Mallory had stated in part:

You may be interested in the results of my last tabulation of the 1933 shipments (January 1st to October 31st), figured out on the percentage share plan. I know there are one or more companies in each district who have ignored this plan entirely and, in the following calculation,

I have omitted their shipments in order to learn the results of the operations of the companies who are more inclined to co-operate for the common good.

To enable you to understand just what I mean by "out of balance," I will explain it by using the figures of Districts 1 and 2 * * * the total shipments from the thirty-six plants for the ten months of 1933 (January-October) amount to 13,611,000 barrels and the "out of balance" shipments are 549,000 barrels of 4% of the total shipments, which means that, if the 549,000 barrels were properly redistributed, each of the thirty-six plants would have shipped its percentage share of the total 1933 shipments.

The following gives the results in the districts my work covers:

	Total Plants in District	No. Plants in This Calculation	Out of Balance
Ea. Pa., N. J., Md., N. Y. & Me.	38	36	4.0%
Ohio, Western Pa. & W. Va.	19	16	8.1%
Wis., Ill., Ind. & Ky.	11	10	12.2%
Va., Tenn., Ala., Ga., Fla. & La.	19	16	7.4%
Ea. Mo., Ia., Minn., & S. Dak.	13	12	4.5%
W. Mo., Nebr., Kans., Okla., & Ark.	13	12	8.0%
Texas	8	8	13.2%
	121	110	

Average for 110 plants out of balance 6.9%. (Com. Ex. 821-2J.)

(g) When the NRA Code was approved November 27, 1933, it contained a provision under which the board of trustees of the Institute was authorized to formulate a plan for the sharing of available business for presentation to the Code Authority for consideration by the Administrator. Earnest and continued efforts to formulate such a plan were made. The Mallory formula, based on productive capacity, and also the so-called "Storey" plan, based upon shipments, were considered. Substantially all members of the industry desired a proration plan, but there was difficulty in agreeing upon a basis for proration. Some respondents had been unable to establish a three-month production record which they felt properly reflected

their productive capacity; some objected to any plan which would allow those mills which had failed to cooperate and had expanded their production at the expense of others to retain their gains; and some objected because they thought chain mills might be favored as against individual mills. Consideration was given to other methods of allocating business, but no plan or method was ever approved by NRA.

(h) A plan was suggested by the chairman of the committee on sharing available business (Joseph Brobston) for the allocation of business by districts, dividing the total in each district between chain mills as a group and individual mills as a group and allowing each group to decide upon further division among its individual members. The minutes of a meeting of the members of the Institute for Districts 1 and 2 held on September 12, 1934, show:

The Chair recognized Mr. Conn, who stated that the meeting was called because of a Resolution passed by the Board of Trustees to the effect that the final Storey Committee report be again submitted to the membership in Districts #1 and #2 for such action as those members desire to take.

The Chair recognized Mr. Coffin, who addressed the meeting relative to his position regarding a plan for sharing available business. After a discussion, the roll call showed that the membership in Districts #1 and #2 was unanimous for some plan of Sharing of Available Business. (Com. Ex. 637-L.)

Thereupon Mr. Brobston presented his plan in detail and the minutes further show:

After considerable discussion the Chair recognized Mr. Coffin, who moved that the trustees of Districts #1 and #2, calling in such assistance as they may deem advisable, attempt to formulate a plan of allocation of business in Districts #1 and #2; seconded by Mr. Conn and unanimously carried. (Com. Ex. 637-O.)

In writing C. F. Conn on September 27, 1934, George F. Coffin stated in part:

A canvass of all the members in Districts 1 and 2 seemed to indicate that in the past the business seemed naturally to fall in figures which showed that 62% of the going business in Districts 1 and 2 fell to the so-called "Chain Companies," and that naturally the remaining 38% fell to the

individual or smaller operating units; I think the statement was made that from whatever angle you looked at the picture, the division remained practically the same. (Com. Ex. 577-2P.)

The minutes of meetings of producers located in these districts do not show the adoption of any plan of allocation but do show that "much labor has already been expended" (Com. Ex. 637-T) upon the subject. Figures for these districts for the years 1936, 1937, and 1938 prepared by Mr. Mallory and rearranged and translated into terms of percentages, show the extent to which shipments conformed to the 62 percent and 38 percent pattern and the relationship of shipments to clinker capacity.

Districts 1 and 2.

	Percent of Total Shipments			Percent of Shipments to Capacity*		
	1936	1937	1938	1936	1937	1938
Total, chain mills	63.42	63.93	62.58	33.28	37.46	34.03
Total, individual mills	36.58	36.07	37.42	37.90	38.82	37.37
Lehigh	16.15	16.72	15.58	29.74	42.41	36.68
Universal	12.31	13.03	12.75	31.19	34.30	31.14
Penn-Dixie	7.77	7.55	7.82	33.05	33.36	32.06
Alpha	6.78	5.78	7.31	30.43	26.96	31.64
Lone Star	6.46	6.99	6.16	42.02	47.18	38.59
North American	6.49	6.78	6.25	39.41	42.73	36.54
Lawrence	5.61	5.21	4.98	35.75	34.51	30.57
Medusa	1.85	1.86	1.72	53.01	55.40	47.55
Vulcanite	2.14	2.35	2.33	22.41	25.61	23.58
Edison	4.53	3.98	3.68	47.46	43.34	37.23
Coplay	2.82	2.84	2.96	31.03	32.43	31.34
Nazareth	3.22	3.14	3.40	39.08	39.61	39.86
Hercules	3.28	3.09	2.95	37.79	37.05	32.75
Giant	2.37	2.51	1.86	28.48	31.33	21.52
Allentown	4.69	4.88	4.47	48.70	52.62	44.75
Keystone	4.22	4.08	4.78	49.65	49.88	54.18
Glens Falls	1.83	2.14	3.26	32.37	39.24	55.43
Federal	1.63	1.74	1.66	33.01	36.63	32.45
Whitehall	5.85	5.31	6.06	71.95	67.80	71.85

(Com. Ex. 3203-A; 3205-A).

* Includes estimated capacity of National Portland Cement Company. Shipments of this company not available.

(i) The nature of the statistical data collected and disseminated to its members by the Institute is shown in a letter dated July 26, 1935, from Mr. Mallory to the manager of the Institute:

(A) Gives the percent of clinker production and cement shipments on the basis of clinker capacity for each district for the preceding twelve months; also the amount of clinker and cement produced, and the shipments, for the current year. The purpose of this report is to enable each company to estimate the production and shipments of its plant or plants and to know every month whether it is producing and shipping more or less than the average of all the plants of the district in which the plant is located. Issued monthly.

(B) The purpose of the report marked "B" is to show all stocks on the same basis by using days' supply instead of barrels in order to bring out clearly when the stock of any one district is becoming too large; to illustrate, on June 30th Michigan had enough cement on hand to supply the 1935 rate of demand until about January 15, 1936, without producing any in the meantime. Issued monthly.

(C) Gives the average factory value per barrel of portland cement from 1920 to March 31st, 1935. This report is issued quarterly.

(D) This series of reports gives for each company the amount of clinker and cement produced, the amount of cement shipped, and the clinker and cement stock of the previous month, together with the total production and shipment figures of the previous twelve months. A key sheet for Districts 1 and 2 is attached, as well as the forms used to obtain the information. (Reports for the Rocky Mountain and Pacific Coast districts are not issued.) The purpose of this tabulation is to enable each company to know not only what it is producing and shipping, but also what each of its competitors is doing.

(E) Gives for each state in Districts 1-9 inclusive the dollar amount of building contracts awarded during 1935 up to the current month, together with the amount awarded during the same period for each of the past three years. The purpose of these figures is to indicate in which state or states there is the probability of a change in demand. An estimate of the probable consumption (shipments into

states) in each district over a period about six months hence also accompanies these figures in order to give the companies some idea of what the future consumption may be. (Com. Ex. 1025-A, B.)

The thought expressed in (D) above was reiterated in a letter by Mr. Mallory to the manager of the Institute dated April 2, 1936, in which he said:

I have no knowledge as to the actual value the reports have to the companies. However, they are issued in the belief that they help the companies by eliminating their suspicions in connection with what their competitors are producing and shipping since they get the facts, and the reports also bring them information about current conditions in the construction industry. (Com. Ex. 2879.)

A few members of the Institute finally objected to such disclosure of the details of their business to competitors. On July 17, 1936, the president of Marquette wrote the Institute in part:

* * * However, we do object to the manner in which reports are presently issued by the Institute. They show the situation with respect to production, shipments, and stocks of each individual plant in a given district, designating each plant by a key number. But, since the key is known to us, and we presume to all other ~~manu~~facturers as well, the result is to make known to each member of the Industry the exact position of each of its competitors.

As in the case of the reporting of contract information, covered by the attached copy of letter, we maintain that such a detailed dissemination of information serves no useful purpose whatsoever. We do not require that information concerning the business of our competitors and we see no reason why they are entitled to such information concerning our business.

All that is necessary or desired is a simple statement once each month exactly similar to the statement produced by the Bureau of Mines. This statement shows the production, shipments, and stocks by districts established by the Bureau many years ago. The district figures cannot be broken down by anyone to show the individual figures of a particular manufacturer. Preferably an effort should be made by the Institute to cause the Bureau of Mines to speed up its monthly compilations and dissemination of these figures. If this were accomplished, there would be

no need for duplicating the work through the Institute as is now done. (Com. Ex. 1025-G.)

The president of Ash Grove, L. T. Sunderland, on August 22, 1936, wrote to Charles F. Conn, chairman of an Institute committee, suggesting the trustees should be advised concerning

The known objections on the part of an uncertain number of the members of our industry to the form in which reports of production, stocks, and shipments have been distributed. Frankly, I question whether we could secure government approval of our present method and forms which reveal to competitors such intimate details of their business operations.

* * * * * *

It is well known that such statistics have been misused, and besides, have been a source of constant irritation ever since they were instituted, which I believe was under the NRA. Consideration of this matter is clearly contemplated by Section 2, Page 6 of the report, but I think the Trustees at the time of receiving the report should be informed of the objections which have been registered, both formally and informally, against the revelation of individual statistics. (Com. Ex. 870-6H.)

In testifying with respect to the above-mentioned letter, Mr. Sunderland said in part:

Q. You said that the revelation of such matters to competitors tended to make a mill who was not increasing its business suspicious of the man who was increasing his business?

A. I did. (T. 13665.)

* * * * * *

Q. Has there been any specific harm result to your company from it?

A. Well, that is rather intangible and I couldn't give you any specific case.

Q. What is your belief in regard to it?

A. Well, I believe that when we have been fortunate enough or enterprising enough to do a larger amount of business than some of our competitors, our jealous competitors thought we ought to do, doubtless it would result in activities of theirs that were harmful to us. (T. 13669.)

(j) Continuing as they did a prior cooperative activity of many years' standing, the statistical services of the

Institute in furnishing to each corporate member of the Institute intimate details of the business of each of its competitors and the relationship thereof to the aggregate business, accompanied as they were by other activities set out herein, resulted in substantial restraint upon the price, production, and sales policies of the corporate respondents and tended to substitute collective opinion for individual judgment.

Paragraph Sixteen: (a) Another aspect of the cooperation among respondents to prevent increases of production of cement which might interfere with price stability appears in their organized opposition to the entry of new production and new competitors into the cement industry.

(b) The proposed code submitted to NRA by the Institute provided that prior to the establishment of a new plant, an increase in capacity of an existing plant, or the moving of a plant to another location, the Institute might, if it believed the facts warranted such action, petition the President to prohibit the contemplated action. The NRA Code for the Cement Industry, as approved, contained such a provision. At a meeting of the trustees of the Institute on December 7, 1933, it was moved that:

* * * it is the position of this Board that there should not be any increase of productive capacty in any area; seconded by Mr. Affleck and unanimously carried. (Com. Ex. 616-D.)

At a meeting of the trustees of the Institute on May 10, 1934, the minutes show:

The chair also read a report from Mr. John Treanor, Trustee District #11, in which it was recommended that the Southwestern Company be permitted to relocate 50% of its Victorville plant at Torrance and that the members of the Institute in Southern California accept the statement made by the Southwestern Portland Cement Company that this relocation will not, in any way, increase the productive capacity of the District. After discussion, the Chair recognized Mr. Rader, who moved that the Southwestern Portland Cement Company be granted this permission in accordance with the statements made in their letter; seconded by Mr. Sunderland; unanimously carried. (Com. Ex. 620-C, D.)

(c) In a circular letter to Institute members dated December 14, 1935, George H. Reiter, general manager of the Institute, advised that:

* * * Colonel John B. Reynolds of the Cement Information Bureau of this organization appeared before the Resolutions Committee for the purpose of presenting and discussing a resolution which he had been requested by officials of the National Association of Manufacturers to draft in regard to the policy of the Reconstruction Finance Corporation in extending loans to units of industries already in a state of excess capacity of production. (Com. Ex. 674.)

The resolutions committee recommended the insertion of a resolution in opposition to "this harmful practice" in the report of the committee on relations of government to industry. Mr. Reiter then suggested that members of the Institute who were members of State and local associations "can do much by urging these organizations to take similar action and by bringing the matter to the attention of their senators and representatives in Washington."

(d) At least a portion of the mechanics of the opposition to new capacity appears in the activities shown by the record with respect to the completion of a cement plant at Foreman, Arkansas. On January 11, 1934, a vice president of Arkansas wrote Charles Boettcher, president of the Ideal Cement Company, which controls Arkansas, and stated in part:

We have heard several rumors here to the effect that the cement plant at Foreman, Arkansas, is trying to resume building operations and operate under the Code Authority.

* * * * *

With the curtailment of production of other going concerns, it would be a catastrophe if any additional tonnage were put on the market at this time. (Com. Ex. 415-28.)

Mr. Boettcher on January 13, 1934, wrote to B. H. Rader, chairman of the Code Authority, enclosing a copy of the letter received from Arkansas and stating in part:

My understanding is that the NRA does not encourage building or finishing any old plants. Will you kindly let me know something about this, whether the completion of the Foreman Plant can be stopped, or not. (Com. Ex. 415-27.)

On March 10, 1934, Mr. Rader wrote Joseph S. Young, president of Lehigh:

I enclose herewith letter from the Reconstruction Finance Corporation, in regard to a loan they are requested to make to complete a Cement Plant in Southwestern Arkansas. Also attached is all the data the Portland Cement Association has available. I am sending this to you as Chairman of the Committee on Building New Cement Plants.

I am also enclosing a few letterheads of the Code Authority, and if you can add some data to this, I wish you would write a letter. You can sign my name to it and forward it. I thought also it might be advisable to have someone call on the Reconstruction Finance Corp., 33 Liberty Street, New York City.

If you agree with me on this method of handling it, wish you would do so and send copies back to me for our files. You will notice he asks for two copies of the data. (Com. Ex. 415-22.)

On May 24, 1935, Mr. Boettcher wrote Blaine S. Smith, president of Penn-Dixie, who was active in Institute affairs, and stated in part:

At a court hearing connected with the foreclosure sale of the cement plant equipment at Foreman, Arkansas, the other day, I am informed there was testimony offered to the effect that the management of the defunct Company anticipated that you would join with them and complete building of the Plant.

I trust that this statement he made was without foundation, Mr. Smith, as I feel that two Plants located as close together as would be ours at Okay and yours at Foreman would be unable to earn returns on the investment. In fact, it has been my intention to bid on this equipment and if possible, purchase it in order to remove it as a menace to the market in Arkansas. As you know, there are so many Plants which sell into the State of Arkansas that there is very little business for any one of them, and placing this promotion at Foreman into production would make conditions much worse than they are at present, with probable resulting price demoralization. (Com. Ex. 500-H.)

Mr. Smith replied to this letter on June 8, 1935, in part:

We naturally are interested in seeing no increase in cement productive capacity in the country. There is too

much already. But, if this plant is going to be completed anyway, and of course that is their intention, we thought we might be interested in it.

The result of our investigation was not favorable and I doubt if we could become interested. I understand the sale which was scheduled was postponed to a later date. (Com. Ex. 500-G.)

On September 30, 1935, Coy Burnett, an official of Monolith, telegraphed F. M. Coogan, president of Alpha, who was active in Institute affairs, as follows:

Learn that R.F.C. authorized three hundred thousand loan to American Portland Cement at Foreman Arkansas for plant completion stop Believe this matter merits intelligent opposition. (Com. Ex. 942-B.)

Mr. Coogan replied by telegram on October 1, 1935, as follows:

Telegram received Cement Institute wiring protest against loan to Foreman Arkansas plant copy of which will be sent you This will be followed up vigorously by personal contacts. (Com. Ex. 942-C.)

On October 1, 1935, G. F. Coffin, in his capacity as president of the Institute, telegraphed the Chairman of the Reconstruction Finance Corporation, making a strong protest against a loan for the completion of the Foreman plant. On October 8, 1935, Mr. Coffin advised the members of the Institute of the reply received from the Reconstruction Finance Corporation, and stated in part:

I am, therefore, sending you a copy of Mr. Jones' reply. It is evident that additional and energetic effort be made by the membership to forestall this additional, excessive capacity. Copy of the letter follows:

"Permit me to acknowledge your telegram of October 1.

"This Corporation has made a commitment to the American Portland Cement Company. The economic justification for this loan was that the Engineer's reports indicated that the plant could operate at a profit if completed according to plans and specifications. The record further showed that a very large number of innocent stockholders had invested six or seven hundred thousand dollars in the stock of this Company, which investment represented a total loss to them unless the plant could be completed.

"If the applicant is able to meet the conditions imposed, the Corporation will be compelled to comply with its commitment." (Com. Ex. 1029-B.)

On October 10, 1935, R. J. Morris, vice president of the Ideal Cement Company, wrote B. F. Affleck, president of Universal, setting out in detail the conditions imposed by the Reconstruction Finance Corporation with respect to the Foreman loan, and stated:

As I stated to you over the 'phone, this loan is apparently a menace to the entire cement industry, as it will constitute the entry of the U. S. Government in the manufacture of cement. (Com. Ex. 553-5Z, 6A.)

On October 14, 1935, George F. Coffin, president of the Institute, addressed a letter to all members of the Institute in which he advised of a further protest made by him to the Reconstruction Finance Corporation against a loan for the Foreman plant and continued:

On the whole, I would say that my previous request for help in this situation has met with a very generous response, and R.F.C. by this time, in addition to The Institute's protest, has a large number of individual manufacturers' protests. I think we are making real progress, but additional help is highly desirable. Kindly advise me of any steps that you take along the line of backing up The Institute's protest. (Com. Ex. 500-B.)

On November 12, 1935, an article by B. C. Forbes entitled "Wasted Taxes" appeared in the Chicago Herald and Examiner sharply criticizing an RFC loan authorized for the Foreman plant. A circular letter to all members of the Institute on November 18, 1935, by George H. Reiter, general manager, contains the following:

The attached syndicated article by B. C. Forbes may already have reached your attention.

The article indicates very clearly Mr. Forbes' friendly interest in this Industry, as has previously been shown on a number of occasions. This present article was based on information from various sources compiled and prepared by the Cement Information Bureau of The Cement Institute and personally presented to and discussed with Mr. Forbes by Colonel Reynolds. (Com. Ex. 1032-G.)

On February 11, 1936, the manager of the Washington office of the Portland Cement Association wrote the Institute in part:

Sorry to be delayed in thanking you for the material

which you so promptly sent to us regarding the proposed RFC loan to the American Portland Cement Company at Foreman, Arkansas, and the Washington-Idaho Lime Products Company at Orofino, Idaho.

I am holding the material regarding the former item until we are approached again by Mr. Macartney of the RFC. (Com. Ex. 1028-G)

This and other correspondence in the record indicates that the assistance of the Portland Cement Association, composed largely of members of the Institute, was enlisted in the opposition to the completion of the Foreman plant. This plant was not put into operation.

(e) A similar cooperative plan of opposition through the Institute, and otherwise, against a Reconstruction Finance Corporation loan for a plant at Orofino, Idaho, was carried out in 1936 by respondents but in this instance was unsuccessful. The Institute, through its Cement Information Bureau, also interested itself in opposing the construction of cement plants by States or municipalities.

(f) When the Tennessee Valley Authority had in contemplation the use of millions of barrels of cement and called for bids on cement for its construction work, it received bids from various of the corporate respondents which were substantially identical in price. Thereupon, a study was undertaken by TVA to determine the practicability of building and operating its own cement plant. While this study was in progress John Treanor, president of Riverside and a trustee of the Institute, arranged a meeting of Chairman Arthur E. Morgan of the TVA; Charles F. Conn, president of the Institute; John J. Porter, a trustee of the Institute; Blaine S. Smith, president of Penn-Dixie; and himself. In a memorandum to the Board of Directors of TVA dated February 28, 1934, Dr. Morgan dealt in detail with this conference. He stated in part:

We discussed the Tennessee Valley Authority and its building program, and then discussed our need for cement. Mr. Conn and the others present undertook to explain to me the general nature of the organization of the industry. The personal impression I received from listening to them is that, in their opinion, uncontrolled price competition in a staple industry will tend to destroy that industry, that some kind of control is necessary for stabilization, and that the cement industry has sought to

bring about such control; that the problem is a difficult one and has not been completely worked out, especially in its relation to the public. There might be superficial appearance of collusion and conspiracy against the public, when in fact there was only an honest effort to stabilize the industry for the benefit of everyone concerned. * * *

He stated a preference for purchasing cement but said that:

Inasmuch as a call for bids results in receiving identical bids for cement, from our point of view as consumers there is no competition; * * *.

He suggested a joint examination of costs to determine a fair price which TVA would pay for cement and then stated:

If bids received should not be reasonable in the terms of these findings, then the Tennessee Valley Authority would take such action as it should see fit toward the production of its own cement. (Com. Ex. 344-A-E)

After long-continued negotiations, Dr. Morgan, on September 3, 1934, telegraphed Blaine S. Smith in part:

It is Imperative that We Determine Our Course as to Purchase or Manufacture of Cement Without Further Delay Stop We Plan to Advertise for Bids for Cement and Also for Building a Cement Plant Immediately After Thursday Meeting Stop Bids Received for Cement Will Then Determine Our Course Stop Thursday Meeting Should Bring Negotiations to a Conclusion Stop * * * (Com. Ex. 354-A)

On September 5, 1934, John Treanor telegraphed Blaine S. Smith the substance of a telegram he proposed sending to Dr. Morgan. Replying on the same day, Mr. Smith wired Mr. Treanor:

Retel Just Received Consider Your Proposed Wire Entirely Justified and With Such Revisions as You May Make Believe It Should Be Sent as Night-Letter Tonight as Our Meeting is at Ten Thirty Central Standard Time Thursday Morning September Sixth Will Keep You Posted (Com. Ex. 562-12H)

Thereupon Mr. Treanor telegraphed Dr. Morgan in part:

* * * The Fact That I Have Long Maintained and Do Maintain a Personal Loyalty to You Entirely Free From Self-Interest Also Entitles Me in My Judgment to Ex-

press Myself Freely and Frankly in a Personal Way Not in Any Way as Member of Industry Committee Stop I Am Discouraged and Disillusioned by the Conduct of This Investigation Purporting to be a Fair Inquiry to Discover the Truth Stop To My Mind You Have Kept the Work of Promise to the Ear and Broken it to the Hope Stop You Have Done This Unwittingly I Believe Through a Deepset General Prejudice Against Business Men a Prejudice Unwarranted as I Believe in Your Case at Any Rate Stop I Think That While You Have Gone Through a Form of Investigation of This Cement Matter and While You May Believe That You Have Truly Investigated It You Have Not Opened Your Mind Stop You Have in Fact as I See It Adopted a Course Calculated Merely to Coerce the Companies by Threatened Use of Arbitrary Power to Build the Sheffield Plant * * * Is Your Judgment Final Infallible and Not to Be Questioned by the People Whose Vital Interests Are So Deeply Involved Stop To Me Your Present Action is Bald Assertion of the Immense Power Which is Yours Through Your Control of Vast Government Funds Stop It is a Ruthless Declaration That This Power Can Be Used at Will Without Obligation to Justify its Use Stop It is Tantamount to Arbitrary Determination of the Industry Price Under Threat of Dire Punishment in Case of Resistance * * * You Have the Opportunity to Aid in the Development of a Process of Cooperation Between Industry and Government or to Deal the Prospects of Such Cooperation as to This Particular Industry a Serious if Not a Fatal Blow Stop I Tell You Also as a Friend in Candor and in All Sincerity That It Is My Belief That if You Embark on This Project in the Face of the Alternative Which is Before You Comma It Will Result in Disappointment and Chagrin to You and Your Associates and an Injury to the Administration of Which You Are a Part Stop I Remain With Kindest Feeling. (Com. Ex. 354-B-D)

Within a few days thereafter a formula worked out between TVA and members of the industry was accepted. Subsequent thereto, identical bids equivalent to $1.30 per barrel f. o. b. the second nearest mill, made pursuant to the agreed formula, were accepted and cement was purchased by the Tennessee Valley Authority.

Paragraph Seventeen: (a) A large proportion of the cement sold by the corporate respondents is distributed to

and through dealers. Irregularities, in price or otherwise, in the sale of cement by dealers tend to disturb uniformity of price and terms of sale among respondents. Means of eliminating or avoiding such disturbances were sought by respondents through agreements and understandings among themselves and with groups of dealers and dealer organizations to secure uniformity in their dealer policies; to minimize competitive conflicts between themselves and dealers, as well as among dealers; to reduce irregularities in sales by individual dealers; and to minimize price competition among dealers.

(b) As in the case of other concerted action by respondents, that taken with respect to dealers and dealer policies began many years ago and the Institute has continued, adapted, and supplemented previous actions as changing conditions and circumstances dictated. As set out in Paragraph Fourteen, the Association of American Portland Cement Manufacturers, in which numerous respondents herein were members, recommended in 1915 that a dealer be defined as:

* * * a merchant, firm, or corporation regularly engaged in selling Portland cement and other building materials purchased by him for resale only; who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building-material dealer. (Com. Ex. 3193, p. 12)

and, further:

* * * that no dealer be quoted for shipment to any town other than his home town except at consumer price, excepting only in towns adjacent to his home town in which there is no dealer. (Com. Ex. 3193, p. 2)

The Portland Cement Association, largely composed of respondents herein, recommended in 1919 the adoption by manufacturers of the following dealer definition:

A dealer is a person, firm or corporation regularly engaged in selling Portland Cement and other merchandise, especially building materials, purchased by him for resale; who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building material dealer. (Com. Ex. 3192, p. 4) and further:

* * * a dealer should be quoted the consumer price on cement for shipment to any town other than his home town, except that it is proper to quote the dealer price

to such a dealer on cement for delivery in towns adjacent to his home town in which there are no dealers. (Com. Ex. 3192, p. 9)

(c) A chronological outline of the cement marketing structure published by Lehigh in 1931 reads in part:

Prior to 1913—Dealers generally were not protected in any way. In some sections attempts had been made to establish dealer protection in one form or another, but none succeeded.

January 1913—On operations requiring less than 7500 barrels each, first efforts were made to quote only through dealers. On jobs requiring more than 7500 barrels, the minimum price was quoted to contractors.

December 1913—The quantity per operation on which the dealer received protection was increased to 15,000 barrels.

Throughout 1914—No general protection was given to dealers on any quantity. However, late in 1914, in the Northeastern states, protection was once more given to dealers generally on jobs of less than 3000 barrels. The quantity was again successively increased to 7500 barrels and 15,000 barrels. In the central West dealers were protected to the extent of 5¢ per barrel regardless of quantity.

February 1915—In all territories contractors were quoted 5¢ per barrel higher than dealers, regardless of quantity.

February 1916—The differential was increased from 5¢ to 10¢ per barrel.

August 1926—The Trade Discount method of quoting was advanced, making price to dealer and consumer the same, but with a 10c per barrel dealer discount to dealers on business handled by them.

November 1930—The Service Payment Plan of dealer protection was created.

And, in 1931—The flat price method of quoting without general dealer protection, returned. (Com. Ex. 971-33N, 330)

In commenting upon some of the changes made and the underlying causes, Lehigh stated in part:

Before 1913 the flat price method of quoting prevailed most generally—the same price being made to dealers and consumers. The difficulty with this method was that while some manufacturers did not sell carloads to consumers where they had dealer representation, others, with-

out such representation, did quote and sell direct. With the rapid growth of carload business this difficulty led to market conditions so disturbed that both dealer and manufacturer sought to develop methods that would correct these conditions and give both a stable basis of operations.

* * * Price discriminations brought the invariable result of secret concessions, inside commissions, unequal and unfair dealing as between buyers in the same market and inevitable trade resentment and resistance. (Com. Ex. 971-330)

With regard to the 10¢ per barrel differential, Lehigh stated in part:

While the entire industry observed the 10¢ per barrel differential, disquieting happenings indicated that there would be difficulty in maintaining it.

In a desire to obtain attractive carload business, many dealers continued to sell on a 5¢ margin, and thus quoted the manufacturer's product to the consumer at a lower price than the manufacturer himself would quote. The manufacturer who endeavored to uphold the 10¢ differential for dealers soon found himself at a disadvantage in actual selling—the business going to competitive brands on which split differentials were quoted.

The practice of selling through cut dealer differentials again became so general that a complete breakdown of the structure of dealer protection was impending. Manufacturers, dealer associations, and prominent individual dealers again renewed their activities to correct the evils, and there was an urgent call for a new marketing structure. (Com. Ex. 971-33V, 33W)

Difficulties arising under the trade discount plan were stated as:

Cutting the Trade Discount by competition between dealers in their own markets. Often this was done to sell other materials.

Shipping for the account of a dealer to markets other than his own. By this practice the manufacturer, using for the purpose a dealer who would cut his differential, sold carload tonnage over a wide territory at less than the manufacturer's own price to the consumer.

The subterfuge dealer, created by the manufacturer to secure attractive business at split discounts.

The "assigned contract," where the dealer—real or subterfuge—received a small commission for the use of his name, enabling the manufacturer to sell direct and pass the Trade Discount on to the consumer. (Com. Ex. 971-34B)

(d) Having returned to the practice of giving no discount to dealers, a method of controlling competition between dealers and manufacturers and among dealers was desired. The next step taken appears in the code agreed upon and presented to NRA by the Institute. Among the provisions proposed were the following:

1. Except as otherwise specified, Portland cement shall be marketed in each community through the building material dealers, regularly serving such community. This applies to all classes of buyers except as in Paragraph 2. Importers, brokers, and so-called distributors shall be considered as competitors.

2. The following classes of buyers shall be sold direct by a manufacturer and at the same price and under the same terms and conditions of sale as to dealers, except as provided in Paragraph 6:

United States Government,

State Government, counties and parishes when properly authorized to purchase cement for public improvements or maintenance.

Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities or villages.

Railroads filing tariffs with State or Interstate Commissions, including Terminal Railroads and contractors doing work for such railroads.

Owners or contractors buying for power development, flood control, and water supply projects not requiring dealer service.

Concrete product manufacturers including block, tile, roofing, pipe, piling, and all other precast concrete units, when for their own manufacturing operations but not for resale.

Commercial concrete mixing plants for their own processing operations but not for resale.

3. Definition of a dealer.—A cement dealer in the Industry is one who has an established place of business where he is regularly engaged in selling Portland cement and other building materials to the public, with facilities to serve the retail trade in a given territory and able and willing to perform all functions devolving upon him in securing, performing and protecting contracts for the delivery of Portland cement for specific work on his account.

The dealer's compensation shall come from the sale of his materials to his customer, based on services rendered and the cement manufacturer shall not pay a dealer commissions or other remuneration. (Com. Ex. 556, pp. 13, 14)

When approved on November 27, 1933, the Code for the Cement Industry contained the above provisions in substantially identical language. Numerous interpretations of these provisions were issued by the Code Authority during December 1933 and January 1934, determining the application of such provisions in specific cases. On January 24, 1934, by order of the Administrator, these provisions were set aside and were never thereafter a part of the approved NRA Code for the Cement Industry. In response to a subpoena duces tecum calling for communications between Colorado and various parties, including Baxter McClain, manager of the Kansas City Division of the Institute, Colorado produced a mimeographed memorandum dated 2/17/34, bearing no signature except the printed letters "McC.", and reading in part:

Memo to Sales Managers:

Attached hereto a complete copy of Cement Trade Practices revised to and made effective February 17th, 1934.

The pertinent changes from former revisions are in Sections 7 and 8, and specifically in reference to NRM projects (Section 7) and CWA projects (Section 8) • • • If not clear after study call up. (Com. Ex. 947-16L)

The above memorandum was accompanied by a mimeographed circular bearing the same date and entitled "Cement Trade Practices (Revised to date)" (Com. Ex. 947-16M). This memorandum contains in almost identical language the definition of a dealer which appeared in the provisions of the Code which were set aside on Janu-

ary 25, 1934, and provides, though in much greater detail and with some modifications respecting Government work, for substantially the same division of sales as between manufacturers and dealers as appeared in the stricken portion of the Code. The record does not show similar action by other divisions of the Institute at that time and there is evidence that considerable confusion and uncertainty developed. The Code Authority, however, continued to interest itself in and make suggestions concerning procedure in the method of handling sales in various trade classifications. On April 16, 1934, the chairman of the Code Authority advised all members of the industry "how they may quote a contractor for sale by a dealer a price fixed for such resale by such dealer" (Com. Ex. 1020-F). In the meantime, agreements between respondents and dealers were worked out with respect to classification of trade and division of business between respondents and dealers. On June 8, 1934, the chairman of the Code Authority advised all members of the cement industry in part:

I enclose herewith New Article XI. I am able to advise you that the National Federation of Builders Supply Associations, Inc. have accepted this on the basis that it will be put in for a four or six-months' trial period, and if at the end of that time, it is not working satisfactorily to either the dealers or the manufacturers, we will both go to Washington and try to have it corrected so that it will be satisfactory to both of us. (Com. Ex. 1021-A)

Hearing upon the proposal was had before NRA on July 11, 1934, at which a statement on behalf of the cement industry was made by Charles F. Conn in an effort to secure reinstatement of the trade-classification and division-of-business provisions which had been stricken from the Code. This attempt was unsuccessful. Finally, in February 1935, some of the corporate respondents began issuing statements of marketing policy. One respondent, in sending the statement to its salesmen, explained the existing situation by stating in part:

Announcement is made at this time because the Consumer's Advisory Board and the legal division of the NRA have definitely and finally blocked all efforts to include any classification of buyers in our Code. Please understand that the Industry was perfectly willing to compromise with the dealers, and in fact, several such

compromises were arrived at during the past year. Action in each case was blocked by the National Recovery Administration. This statement of policy represents practically the last compromise. (Com. Ex. 1923)

In making its announcement of policy, Lehigh stated in part:

For sometime efforts have been directed by both dealers and manufacturers toward establishing a policy for the sale of cement which would adequately protect all interests concerned. * * *. (Com. Exs. 643-B; 873-C)

(e) The policies thus announced provided in substance for approximately the same division of business between respondents and their dealers as was contained in the provisions stricken from the NRA Code. Similar policies which grew out of conferences and agreements between respondents and dealers having been announced by various of the corporate respondents, the National Federation of Building Supply Associations advised its directors "and also several hundred outstanding dealers through the United States" under date of February 25, 1935, in part:

You will find enclosed a typical statement of policy such as is being issued by individual cement companies throughout the United States. So far as they have been issued by the cement companies, we believe the statements of policy are identical.

This is not now a Code matter but an Association problem, and the officers of the Federation must ascertain the position which the Industry wishes them to take in regard to this matter.

Will you give this problem your immediate and thoughtful consideration. Before March 4, I would like to have a reply from you, giving the Federation officers your opinion of this announced policy for the distribution of cement and your considered advice as to what action, if any, should be taken by the Industry. (Com. Ex. 2390)

The secretary of the Southwestern Lumbermen's Association, in writing to Oklahoma on March 16, 1935, stated in part:

It is our understanding that there will be a meeting of the cement industry in Chicago next Tuesday. We attach herewith a purported declaration of what is being considered at this time by certain manufacturers. Be-

lieving that in its final analysis, these are matters that should be negotiated between the dealers and the manufacturers, and recognizing the fact that the Oklahoma Portland Cement Company has strongly favored a dealer policy, we trust the attitude of the Oklahoma Portland Co. in this Chicago conference will be favorable toward maintaining a strong dealer policy. (Com. Ex. 737-2B)

On or about March 19, 1935, there was a meeting in Chicago between representatives of the dealers and representatives of the Institute at which changes proposed in the dealer policies announced by cement manufacturers in February were considered. A similar meeting was held in Chicago in April 1935. At these meetings dealer policies were decided upon. On April 29, 1935, the Nebraska Lumber Merchants Association wrote "to All Cement Companies Serving This Area" in part:

We have been informed that the cement distribution policy developed in Chicago on March 19th has been accepted by the majority of the cement industry. (Com. Ex. 461.)

In writing to the Mountain States Lumber Dealers Association under date of March 2, 1936, the Nebraska Lumber Merchants Association stated in part:

I am rather surprised at your letter regarding cement distribution, for this reason—I was under the impression that the cement distribution statement which was worked out nearly a year ago, was applicable to the entire United States.

Our Trades Relation Committee as well as the Southwestern and Northwestern's Committees, sat in with the heads of the cement industry and worked out a cement distribution statement, copy of which is enclosed. I might say that this is the accepted distribution statement used by all cement companies in the Central Middlewest.

• • • • • •

You will be interested in knowing that since this statement was adopted, April 30, 1935, there is no record of any cement company having violated it in their transactions. I regret to say that we cannot say that much for our retail dealers. (Com. Ex. 1904-A, B.)

At a meeting of members of the Sixth District of The Cement Institute held on July 17, 1935, at which George H. Reiter, manager of the Institute, was present, a method of marketing cement substantially identical with the

method adopted in the Chicago meetings was agreed upon. The district trustee of the Institute, M. C. Monday, in writing on July 24, 1935, to the various members of the Institute in that district, stated:

I beg to enclose herewith three (3) copies of the Method of Marketing Cement and three (3) copies of the Interpretations in connection with Section 2 of Method of Marketing Cement on State Government Work.

These Plans and Interpretations were unanimously concurred in by all members of the Southeastern District and approved at the meeting held in Knoxville on Wednesday, July 17, 1935. (Com. Ex. 547-4C.)

The various understandings and agreements provided in exact and detailed terms for the division of business between manufacturers and dealers; that is, the types of business that would be accepted by cement manufacturers and the types that would be refused and therefore handled by dealers. The details of this division appear in the dealer policies announced by the corporate respondents. The practices thus established were almost completely uniform and were effective over areas which account for the major part of the National cement consumption.

(f) Having agreed upon dealer policies, steps were taken to maintain uniform compliance with such policies. On April 24, 1935, B. H. Rader addressed letters to other trustees of the Institute stating:

Mr. Harlod S. Chaffee, of Buffalo, New York, has been appointed contact man between the National Federation of Builders Supply Association and cement manufacturers by the National Federation.

You will undoubtedly hear from him from time to time on alleged violations of the Sales Policies by manufacturers, and I hope you will give him any information you can that he asks for, as he is trying very hard to do a constructive piece of work between the dealers throughout the country and the manufacturers. I am sure you will find him fair, open and above board with you. He does not want to put any one on the spot but does hope to straighten out as many of the difficulties as he can. (Com. Ex. 832-G.)

Various of the trustees acknowledged this letter from Mr. Rader, saying: "It will be a pleasure for me to cooperate with Mr. Chaffee in any and every way that would seem helpful in this connection" (Com. Ex. 832-D); "We

will be glad to be of any service possible to him" (Com. Ex. 832-C); and "Will be glad indeed to cooperate to the fullest possible extent with Mr. Chaffee. If you say he is O. K., that is enough for me" (Com. Ex. 832-E).

Paragraph Eighteen: (a) The concerted action of respondents in establishing a specific division of business between themselves and dealers included a division of sales to agencies of the Federal Government. For many years prior to 1935 it was the established practice for producers of cement to make direct sales to Federal agencies. The new dealer policies put into effect in 1935 provided, however, that sales of cement to the Federal Government for emergency or unemployment relief agencies such as the Works Progress Administration, Civilian Conservation Corps, and Federal Emergency Relief Administration should be made by dealers. This change resulted in the Government being unable to make purchases of cement for such uses directly from respondents and in its being obliged to purchase its cement requirements in those categories from dealers. The prices paid dealers necessarily included the dealer mark-up and were higher by that amount than would have been the case in direct purchases from producers. Purchases from dealers also prevented the Government from taking advantage of land-grant rates in order to reduce its delivered cost of cement. A further result was to limit the sources from which purchases might be made.

(b) In order to smooth the path for these changes, the president of the Institute appointed a committee to maintain contact with Government purchasing agencies and, so far as possible, further the respondents' new dealer policies. In writing to George H. Reiter on May 18, 1935, George F. Coffin stated in part:

For the present, as President of The Institute, I am appointing you chairman of what you might call an informal committee, for the purpose of keeping in close touch with the various departments in Washington; and with you I am also appointing:

G. E. Warren,
F. M. Coogan,
E. P. Lucas,
J. F. Neylan,
L. T. Sunderland,
S. W. Storey.

The duty that I am assigning to the members of this committee is to keep in close touch with developments in the purchasing end of material for this governmental work, and report back to me, * * * (Com. Ex. 415-373.)

This Institute committee cooperated with E. J. Mehren and William Kinney of the Portland Cement Association and with L. I. MacQueen, H. S. Chaffee, Frank Carnahan, and other dealer representatives in presenting the agreed program for division of business to officials of the Procurement Division. After initial conference with purchasing officials, E. J. Mehren telegraphed George H. Reiter on July 10, 1935:

Believe it desirable to bring to Washington copies original Code and of draft of direct and dealer selling agreed on subsequently with dealers also copies declared policy of companies regarding direct and dealer selling (Com. Ex. 415-542).

A letter to all members of the Institute dated July 10, 1935, by George H. Reiter, as chairman of the trade practice committee of the Institute, stated in part:

The Trade Practice Committee met in Chicago on July 9 and designated your Chairman, together with Counsel, to serve as a subcommittee to expedite this work. The subcommittee had a preliminary conference in Washington about ten days ago with Captain H. E. Collins, who is assistant to Admiral Peoples, Director of the U. S. Procurement Division. Also present at this conference was Mr. H. E. Hilts, who is a commodity chief in that division, serving as adviser on cement problems.

The U. S. Procurement Division will have general supervision of the purchase of all materials under the so-called four billion dollar emergency fund. This will include purchases for resettlement programs, for highways, for federal relief activities and for other projects financed by that fund.

We have just received a request from Captain Collins to attend a joint conference to be held Friday afternoon, July 12, at his office in Washington to discuss cement purchases. He requests that both the dealers and the manufacturers of cement should be represented at this conference by a small committee. We are informed that the dealers will be represented by Messrs. Frank Carnahan of the National Retail Lumber Dealers Association and L. I. MacQueen, Secretary of the National Federation of

Builders Supply Association. To represent the cement manufacturers President Coffin has designated Mr. John F. Neylan and Mr. George H. Reiter, who are both members of the Trade Practice Committee. (Com. Ex. 1022-N.)

In a letter to all members of the Institute dated July 15, 1935, advising of the conference had with the Procurement Division, Mr. Reiter stated in part:

The Committee for the Cement Industry explained to Captain Collins that there had developed in the Cement Industry a method of sales and of distribution which was characteristic of the territory east of the Rocky Mountains —that is, excepting in districts 10, 11, and 12, there was a definitely accepted practice of marketing cement throughout the country.

It was therefore stated that the committee believed it would be in accord with such established practices for the United States Government to purchase direct from cement manufacturers in the following cases:

1. Purchases by or for governmental departments not regularly engaged in emergency relief work.
2. Highway pavements and grade crossing elimination projects.
3. Bridge, culvert and repair work awarded as part of highway pavement contracts.
4. Water supply development work located outside of and not designed to serve cities, towns and villages local to such projects.
5. Large water power, flood control and irrigation work located entirely or partly outside of cities, towns or villages.

As to all other purchases and projects, it was indicated that it would be in accord with the established practices of cement manufacturers in Districts 1 to 9 inclusive if the United States Government refrained from purchasing direct. In any such case where the government awards a contract to a contractor such contractor should be permitted to furnish cement which he would secure in accordance with the marketing practices of the cement manufacturers.

Mr. MacQueen, speaking for the dealers, stated that he was in accord with the statement that this plan recognized and preserved the normal method of doing business in the Cement Industry. (Com. Ex. 202-E, F.)

(c) In a letter dated August 28, 1935, L. I. MacQueen, secretary of the National Federation of Builders Supply Associations, stated in part:

There were those who said "it couldn't be done." To them it seemed a hopeless task to buck a Department of the Government which was determined to buy direct. However, it has been done and, in my judgment, it is conservative to say that in excess of $50,000,000 of business will be held in dealer channels which, but for your help and that of the others who joined with us, would certainly have gone direct. Not only would we have lost this splendid volume, but buying precedents would also have been established which would have continued to cause severe losses for years to come.

Instead of disaster which seemed to be certainly headed in our direction, we have been able to gain a signal victory. We have proved to the Government, to manufacturers and to ourselves that we are alive and willing to fight for our rights. More than 10,000 communications went into Washington, I am informed, either directly to members of Congress or to the Procurement Division. Now they should be convinced that a Builders Supply Industry really does exist. (Com. Ex. 2401.)

Paragraph Nineteen: (a) From time to time the corporate respondents who sell cement in some of the larger seaport cities have encountered competition at such ports, and in territory adjacent thereto, from cement of foreign manufacture imported for sale in this country. The most commonly used method of meeting such competition has been the establishment by respondents of arbitrary prices, or price zones, in the territory affected by the lower prices quoted on foreign cement, at the same time maintaining higher prices elsewhere under the multiple basing-point delivered-price system. For a time beginning late in 1932 or early in 1933 a boycott of dealers who handled foreign cement was established in the Boston, Massachusetts, and New York, New York, territories by the corporate respondents engaged in selling cement in those localities. In order for a cement dealer in the affected territory to buy cement from domestic producers during the continuance of this boycott, it was necessary that he discontinue handling foreign cement and agree not to handle it in the future. After about two years, the respondents concerned reverted to the use of arbitrary

price zones. In some localities, including certain Texas ports, persuasion and agreements with dealers were used to combat the importation of cement. The most objectionable feature of imported cement to respondents was its impact upon domestic prices even after the payment of substantial import duties.

(b) In carrying out the boycotts mentioned, the terms used by the participating respondents as the basis on which sales of cement would be made were similar to those stated by Lone Star in its letter of December 31, 1932, to the official in charge of its sales in the New York area:

In keeping with our past performance in other sections of the country, our company has reached the conclusion that in the Metropolitan District, which includes northern New Jersey, you should place in effect immediately the policy of classifying building material dealers who handle foreign cement as competitors and, as such, decline to sell them Lone Star or "Incor" until such time as it can be shown that they have discontinued handling foreign cement and give their assurance that no additional foreign cement will be handled in the future.

The instructions excepted the sale of any foreign cement which a dealer had on hand, but did not except obligations of dealers for foreign cement not yet received or obligations of dealers for future delivery of foreign cement on bids made on that basis. The instructions continued:

Please arrange to have Mr. Bradley watch as closely as possible the known foreign cement deposits in this town. Likewise instruct the representative of Lone Star Cement Company Pennsylvania covering northern New Jersey to watch the deposits in and around Newark and the other known points with a view to determining whether or not any dealers are drawing cement from these deposits.

The Brooklyn deposits we understand are in lower Brooklyn and at the Bohack Terminal. In New Jersey we understand there are one or more deposits at Newark or Port Newark. These should be definitely developed and watched and periodical reports made showing what dealers are drawing cement from the warehouses from time to time. (Com. Ex. 1132-A, B.)

In the Boston area respondents maintained a cooperative system of watching at the place of business of Jenny &

Lux, Inc., importers of foreign cement, to check on dealers' trucks hauling foreign cement from the importer's warehouse. Representatives of various respondents, including Lehigh, Universal, Alpha, Hercules, Lone Star, Lawrence, Allentown Portland Cement Company, Nazareth, Edison, and Giant, took turns in watching the importer's place of business and making lists of dealers' trucks hauling foreign cement. Dealers in New York and in Boston who continued to handle foreign cement were unable to purchase cement from any respondent manufacturer. Some dealers, in their efforts to purchase, canvassed all respondents who normally sold cement in the affected territory without being able to purchase. Representatives of a number of respondents, including Lehigh, Universal, and Penn-Dixie, discussed with dealers the ban on purchases of domestic cement by dealers handling foreign cement, and informed some dealers that the matter had been discussed and agreed upon by manufacturers. In these conversations, references were made by respondents' representatives to the Institute and to meetings of respondents for acting upon the question of removing individual dealers from the "blacklist."

(c) In 1935, after the expiration of the NRA Code, arbitrary prices were again established in the areas affected by imported cement. Respondents filed with the trade practice committee of the Institute detailed notices of such arbitrary prices, specifying the price at each destination in advance of the effective date thereof. The trade practice committee immediately sent complete notice of these price filings, before the effective dates thereof, to Institute members doing business in the territory in which the arbitrary prices were announced.

Paragraph Twenty: (a) The matter of making sales of cement subject only to standard specifications has long been a subject of collective action by the cement industry. The minutes of a meeting of the Association of American Portland Cement Manufacturers in December 1904, at which representatives of a number of the corporate respondents herein were present, show the adoption of standard specifications for portland cement. As set out in Paragraph Fourteen hereof, this association recommended in 1915 that no quotations for or sales of cement be made subject to any specifications other than those of the United States Government or the American Society for

Testing Materials; the Portland Cement Association, of which many respondents herein were members, in 1919 recommended that no sales of cement be made except subject to specifications of the American Society for Testing Materials; the Code of Ethics adopted by the Institute in 1929 prohibited the sale of cement subject to specifications other than those for the American Society for Testing Materials, American Standards Association, or the United States Government; the NRA Code for the Cement Industry, approved November 27, 1933, provided that all portland cement marketed should comply with specifications of the American Society for Testing Materials, American Standards Association, or Federal Specification Board except if cement was designed to meet unusual conditions not covered by the specifications referred to, the price for such modified cement be filed with the Code Authority; the "Compendium of Established Terms and Marketing Methods", issued by the Institute in 1935, after the NRA Code, provided that portland cement marketed by members comply with specifications of the American Society for Testing Materials, American Standards Association, or Federal Specification Board, and stated that products other than portland cement are sold to meet unusual conditions not covered by the standard specifications for portland cement.

(b) For many years the minimum specifications for portland cement have been standardized and all cement has been sold subject to such minimum specifications. This does not mean that cement was standardized, but merely that it was guaranteed to meet the minimum specifications established. As a matter of fact, the cement produced by some mills has exceeded some of the requirements of the specifications by a relatively small margin; that produced by other mills has exceeded some of these requirements by as much as 100 percent, and that produced by the remaining mills has exceeded these requirements by varying degrees within the extremes stated. In 1930, minimum specifications for high-early-strength cement were adopted. The principal difference between standard cement and high-early-strength cement is the fineness to which the latter is ground, and with the establishment of specifications for high-early-strength cement the fineness requirements for portland cement were discontinued. Some of the cement previously sold as standard approximated in

quality the high-early-strength specifications. The cement sold under the high-early-strength specifications has commanded a premium price of approximately 50c per barrel more than standard cement.

(c) There is a direct and substantial connection between cement prices and respondents' interest in requiring that only certain agreed specifications be used in making sales of cement, and this connection received recognition at an early date. At the time when specifications were adopted in 1904, a member commented thereon, as shown by the minutes of an association meeting attended by representatives of some of the corporate respondents, as follows:

This will certainly give us a common ground in the cement business on which we can meet, and will enable a standard uniform article to be made at a uniform price, and anything outside of this standard article, will represent additional cost for additional trouble to meet the whims of any individual. I certainly trust this will be dealt with as a commercial question, as well as an engineering one. (Com. Ex. 3235-U.)

(d) The cement committee of the American Society for Testing Materials, which handles cement specifications, is composed of representatives of manufacturers, consumers, and a general interest group, the manufacturers having representation numerically equal to that of all other interests. In fact, however, the tendency has been for the manufacturing representatives to dominate the action of the committee. Over a long period of years there has been an improvement in the quality of cement generally and an increase in the requirements of the specifications, but there has also been considerable opposition to the higher requirements from the manufacturing group.

(e) Respondents have not only refrained almost completely from advertising quality differences in cement, but have in fact given much publicity to the claim that the quality of all portland cements is practically identical. The general attitude of respondents in these matters is well put in a letter dated March 29, 1934, from Charles L. Hogan, president of Lone Star, to B. F. Affleck, chairman of the committee on public relations of the Institute, in which Mr. Hogan, in describing conditions which led to public distrust of the cement industry, listed among the reasons therefor;

The absence of quality competition between brands, refusal of manufacturers to bid on non-standard specifications at any price and the resistance which has been put forth by the industry to specifications calling for high quality. (Com. Ex. 553-Y.)

and:

It is usual in selling a product to claim advantages for it over the competition. Those advantages are advanced as a reason for buying a braind in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of the manufacturer's proposition. (Com. Ex. 553-2A.)

(f) Resistance to specifications other than those collectively accepted by respondents is illustrated by action shown in minutes of Districts 1 and 2 of the Institute for October 26, 1934, as follows:

The Chair recognized Mr. Wetzler, who brought up the question of unfair specifications in the State of New Jersey. After discussion, Mr. Coffin moved that members of the Industry, in Districts #1 and #2, respectfully request the Portland Cement Association to take under consideration, steps to eliminate the unfair specifications now in effect in New Jersey. Seconded by Mr. Blaine S. Smith and unanimously carried. (Com. Ex. 637-T.)

Also, the minutes of the meeting of the Northeastern Division of the Institute on February 13, 1935, show:

The Chair stated the next matter to be brought to the attention of the meeting was New York State Highway Department Specifications for Portland Cement. After considerable discussion the following Resolution was offered by Mr. Robeson:

Resolved that a committee be appointed to wait on the New York State Highway Department with a request that they change the strengths in Specifications 15 and 15S to conform with present standard specifications.

Resolution seconded by Mr. Neylan and carried * * *. (Com. Ex. 637-X.)

(g) In its advertising the Institute has stressed the theme that portland cement is a standard commodity and negatived the idea of there being a difference in quality between brands. Among advertisements published by the Institute statements such as the following appeared:

Since portland cement is a standard product as uniform as any given grade of gasoline, sugar, or wheat, buyers in any town or city will purchase it only from the cement plant that quotes the lowest delivered price. (Com. Ex. 2835.)

• • • • • •

It is the simple and natural way to sell a standardized product like cement. (Com. Ex. 2836.)

• • • • • •

Since cement is a standard product as uniform as wheat or sugar of any given grade, buyers at any point will buy it only from a cement plant that is quoting the lowest price. (Com. Ex. 2837.)

• • • • • •

Since cement is a standard product, conforming to government specifications, buyers will buy it only from a cement plant quoting the lowest delivered price. (Com. Ex. 2839.)

(h) In general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement sold by different producers. The possession of such knowledge by these groups would tend toward making it impossible for respondents to maintain uniform prices for cement.

Paragraph Twenty-one: (a) When price stability was restored in 1932 and a series of substantial advances in the price of cement were made in that year and in 1933 in the face of the continuing depression, the higher prices and the uniformity of those prices, including identical sealed bids on public projects, brought renewed protests from both public and private sources. As a result of the protests and charges against the cement industry and its members, the Institute and its members engaged in a concerted course of action directed toward allaying the criticism and seeking to convince the public that there was no collusion among cement manufacturers. Measures such as those indicated below were taken to accomplish the end sought.

(b) In writing on May 1, 1933, to Joseph S. Young, president of Lehigh, concerning charges of collusion among cement manufacturers made by Governor Horner of Illinois as a result of identical bids on cement made to that State, H. Struckmann, then president of Lone Star, said in part:

I also wish to confirm my statement to you over the phone, that I am completely in accord with Mr. Mehren's opinion that the public should be fully informed relative to the allegations made by Governor Horner.

I believe that Mr. Mehren's long experience in publicity work would be extremely helpful in creating a better understanding on the part of the public of the situation which Governor Horner has given wide publicity in a rather unfriendly and unjustified manner. (Com. Ex. 829-T.)

In writing to A. J. R. Curtis, assistant to the general manager of the Portland Cement Association, on September 29, 1933, Joseph S. Young said in part:

In an effort to absolve the industry from charges of conspiracy and collusion attempts have been made from time to time to describe the operation of the multiple base system. To the lay mind any price formula and especially one that smacks of base prices conjures up visions of Pittsburgh plus and the nefarious practices of the steel barons. Therefore, any academic explanation of the price system in the cement industry which is intended to describe the operation of the basing point system, is likely, regardless of how ably presented, to prove dangerous. (Com. Ex. 836-3S.)

After stating that explanations made of the pricing formula have unduly accented the importance of the mill price in describing the operation of the system, Mr. Young continued:

The cement industry should encourage the public to view the price as a market price and not as a mill price. Every writer on this subject on the contrary has purposely diverted the attention of the reader to the importance of the basing point in building up the delivered price. Faced continuously with such an explanation the public has every reason to believe that the cement industry has developed a very clever and foolproof scheme for price manipulation.

* * * * *

Over and above this consideration, however, is the fact that the material included in your release is intended to answer certain of Governor Horner's charges and particularly the charge of collusion in refusing to sell f.o.b. mill. Much of your mimeographed statement is devoted to a reprint of my remarks on delivered prices at the public hearing. The argument I tried to advance was that f.o.b.

mill prices, if imposed upon the industry, would result in chaos. If the reader is told on the first page of the release that the industry arrives at a delivered price by adding something to a mill price, it strikes me that he is very likely to wonder why we persist in refusing to sell at a price we say we have. Moreover the reader is bound to cast a skeptical eye at the argument presented in the remainder of the release when in your opening remarks you freely admit that the very mill price that we contend will bring chaos to the industry is not only in existence but in actual use. (Com. Ex. 836-3T, 3U.)

In replying to Mr. Young on October 7, 1933, Mr. Curtis said in part:

Your point relative to the damaging effect of talking about "mill price" is admirable and I think we were all very dense in our failure to spot that fallacy sooner. With reference to "mill price" discarded, one of the chief stumbling blocks in the discussion of uniformity of prices is removed.

* * * * * *

Public curiosity has been aroused to an extent where unquestionably, we must satisfy it or expect bitter consequences. Certain editors who should be friendly feel that we are gouging. A prominent citizen who has carried on battles for us in an Illinois city informed our fieldmen only a few days ago that he had helped us because he knew there were asphalt, brick and several other rings, but believed the cement people were honest; however, he now knew that the latter were tarred with the same stick so he would have to remain quiet and could help us no further.

In an appropriate manner, we should see to it that the incoming and other uninformed public officials are acquainted with this price matter. Isn't it more or less to be expected that a newly elected governor of judicial temperament, lacking in business knowledge but with a political urge suggesting an eye on public expenditures, might be confounded by the riddle of how he can get a dozen bids listing identical quotations at 102 distinctions, except by collusion?

* * * * * *

Many employees of the industry honestly believe that there is collusion. Some sales managers have told me so. I know some Association employees think so. (Com. Ex. 730-H, I.)

In acknowledging a copy of the letter from Mr. Young to Mr. Curtis, Max A. Berns, publicity manager for Universal, wrote Mr. Young on October 4, 1933, in part:

The point you bring out about starting a price equation with a mill price in well taken and in the future we might well avoid starting such discussions with an assumed mill price. (Com. Ex. 836-3P.)

After pointing out that the question of price uniformity had been thrown into the public arena, he contended:

• • • We scarcely can avoid a discussion of uniform prices because the question has been presented by others to the public.

It is for this reason that, although it may require a long drawn-out effort to accomplish results, it seems important to discuss uniformity of prices as well as point-of-delivery prices. Indeed, it is hardly possible to discuss the latter without admitting the former. And since we must in a discussion of delivered prices admit uniformity, we are almost forced to defend uniformity or else leave the matter solely for others to condemn. (Com. Ex. 836-3Q.)

(c) The committee on public relations of the Institute, and various important figures in Institute affairs, began working assiduously upon the problems arising from criticisms of the industry, diversions of business to other materials, and threats of competition from publicly owned cement plants. On March 21, 1934, B. F. Affleck, as chairman of the committee on public relations of the Institute, sent a letter to various members which began, "The cement business is in public disfavor," listed evidences of such disfavor, and concluded, "How shall we cure the situation? A committee of the Institute has been studying it, and wants your counsel" (Com. Ex. 950-B). A further communication from the committee dated March 26, 1934; after again listing causes for the cement industry being in public disfavor, continued:

A study of 2580 recent newspaper articles and editorials mentioning cement shows only 208, or 8 per cent favorable to our industry—92 per cent were unfavorable or indifferent.

• • • • • • •

Analyzing the various points which have been raised against the cement industry, the committee at work on the problem believes the task to be:

1. Removal of misconceptions regarding our commercial practices.

2. Replacing these misconceptions with a favorable attitude based on appreciation of the outstanding contributions of our industry to public health, safety and comfort.

We must convince—

(a) public officials—federal, state and local.
(b) newspapers and other editors.
(c) individuals and groups in the trade.
(d) our own stockholders and employees.
(e) the general public.

Internal education, reaching class (d) is a basic and should seek to make our own people enthusiastic about

—our commercial policies and practices.

—our contributions toward making America a better place in which to live.

A thorough job within our industry should give us hundreds of able helpers in putting our case before the public.

* * * * * * * Meanwhile your views on the need of a program would be helpful to the committee. Please write promptly. (Com. Ex. 950-F, G.)

Suggestions received in response to these letters included:

I'm wondering if we as cement people might not gain if we followed the program of the packers when they were under fire years ago. They published a good many advertisements giving figures to show they were not getting exorbitant profits. (Com. Ex. 950-N.)

* * * * * * * My suggestion is we start a "Good Will Club" in the industry. Pledge everybody to preach good will. Pledge ourselves and divorce from our minds because we are representatives and executives of a large industry that we can do no wrong, and I am making this statement as though I were of a larger company, and eliminate from the minds of your smaller competitors that you are constantly reminded of Shakespeare's quotation in your attitude toward your competitors and your trade, namely "When I speak, let no dog bark." (Com. Ex. 950-Q.)

* * * * * * * The quickest way to dispose of this matter is to give advertising matter to all of the papers in the United States —metropolitan, local and farm.

Quite a few years ago this same matter developed and

the Advertising Committee of the Association at that time started a campaign of placing paid advertising in all of the metropolitan, city, county and local papers in the United States, amounting, I think, to from 4,000 to 5,000 periodicals—the smaller ones being handled through a press agency. The favorable result was almost instantaneous. (Com. Ex. 950-R.)

The reply made by Charles L. Hogan, president of Lone Star, under date of March 29, 1934, is noteworthy:

Your letter of March 21st is timely. I cannot recall a time when the industry enjoyed full public confidence. We are in this unenvious position even though we have done much as an industry to merit confidence. Through the Portland Cement Association, we have maintained an agency of public contact which has accomplished many constructive acts that have rebounded to the public interest. That ill will exists despite the high standing of the Portland Cement Association suggests we must look elsewhere for the cause.

Sporadic efforts to promote good will have consisted mainly of programs calculated to minimize or stifle newspaper criticism through the buying of space. This advertising carried a message calculated to lend importance and prestige to the industry which did not, however, reach the root of our trouble. Telling interesting facts about cement has failed to remove the public distrust which probably has its origin in the suspicion that a close working understanding, contrary to the public interest, exists between manufacturers. This suspicion is intensified by some of the industry's trade practices.

That some of these practices may be necessary does not remove the distrust arising from a lack of understanding and a failure on the part of the industry to meet the issue squarely in print and through its representatives in the field. We have to thank this representation to a considerable extent for the attitude which the trade holds toward our industry. Salesmen frequently intimate that company heads consult freely and are seldom able to explain convincingly why cement is sold in a certain manner.

Some of the conditions and practices of the industry which have contributed to the public distrust and enabled politicians to verbally chastise us without fear of

reprisal are listed below. Some may be more typical of past performance than of present, but both past and present combined to influence the public's attitude. That some practices are in the consumers' interest helps but little if they are misunderstood.

(1) Standardize product.

The absence of quality competition between brands, refusal of manufacturers to bid on non-standard specifications at any price and the resistance which has been put forth by the industry to specifications calling for higher quality.

(2) Uniform destination prices.

The uninitiated are mystified by the industry's ability to anticipate competitor's price at a given time and place. The uniform refusal of manufacturers to bid mill prices has contributed to the misunderstanding.

(3) Uniform terms, sales conditions, trade practices.

This uniformity which in the main is in the public interest is oft times construed as evidence of collusion.

(4) Lack of a binding contract.

Because a specific job contract is not a contract but an option to buy, duplication of bookings giving rise to the checking of contracts has in many instances proved annoying to purchasers. The misunderstandings and unpleasantness which accompanies a price change and the complicated rulings with which we have surrounded the marketing of cement both have their origin in the failure to provide a contract that is binding.

(5) Wasteful solicitation.

For many years there have been too large a number of men on the road resulting in an uneconomical and unwholesome scramble for available business which has raised the question, "Since money can be spent with such freedom, is the price of cement too high?" Some of these doubts have found confirmation in excessive entertainment in which the industry has indulged.

(6) Cross shipping.

The ability to buy at a distant point at a very much lower mill net than the manufacturer secures on short-haul business gives rise to a resentment having its origin in the feeling that those who live close to the mill should receive the most favorable price.

(7) The same price to all classes of users regardless of the volume purchased.

This is contrary to commonly accepted practice in the marketing of many commodities and results in resentment on the part of the large buyers, particularly those like States which are sold at small per barrel expense.

(8) Mills without base prices.

The toleration by the industry of those who poach in high priced areas has not created a feeling of confidence in the desire of management to protect the consumer.

(9) Concerted action on matters that are properly subject to individual company policy.

Many instances of this kind have resulted from States asking for bids on bases that differ from accepted trade practice.

(10) Limitation of competition to a point of sale struggle for an order with all natural differences between companies and products removed.

It is usual in selling a product to claim advantages for it over the competition. These advantages are advanced as a reason for buying a brand in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of manufacturer's proposition.

It would seem that a logical approach to this problem lies in a careful, thorough and candid scrutiny of our entire marketing system. If we sit around the table and try to analyze the problem and prescribe a remedy for certain ills, both the analysis and the cure will be distorted by tradition and our own experience. Better it is, I think, to learn from the consumer, contractor, dealer, the politician and the well-posted individual, just what our supposed shortcomings are, and what they feel we should do to correct them.

I would suggest that a committee made up of younger men in the industry who are familiar with marketing problems and have a knowledge of public relations be designated to conduct this investigation. I would further suggest that the actual contact with the trade and the public be through men not identified with the industry but skilled in making investigations of this type. • • •

Mr. Hogan then listed questions to which answers should be sought and concluded by stating:

After such a survey is made and the report with recommendations distributed, we can then reach a decision based upon facts rather than one based upon hunches. (Com. Ex. 553-X-2C)

(d) On April 10, 1934, the committee on public relations of the Institute submitted an elaborate program. It described the objective thus:

1. To correct misconceptions regarding the practices of the industry held by
   a. Public officials
   b. The newspapers
   c. The public
   d. Other groups

2. To replace the misconceptions with a favorable attitude on the part of the aforesaid groups. (Com. Ex. 2190-A)

suggested bringing to the public an appreciation of the industry's contribution to public welfare, comfort, safety, and health, mentioning as available themes

Concrete for sanitation, * * *
Concrete for comfort, * * *
Concrete for safety, * * *
Concrete for health, * * *
Concrete and Labor, * * *
Service with Cement, * * * (Com. Ex. 2190-B)

listed available methods as

a.* Personal contact
b. Public addresses
c. Printed matter
d.* Publicity
e.* Paid advertising space
f. Radio
g. Moving pictures

As to public officials, it was stated in part:

In dealing with public officials, personal contact by men who have the right address, entree and full information

* Personal contact, publicity, and paid advertising space should be the chief means employed. (Com. Ex. 2190-B)

is important. These public officials fall, chiefly, into the following groups:

1. Federal and State officials
2. U. S. Senators and Representatives
3. State legislators
4. City and County officials.

These contacts should be planned, scheduled and checked up by a central office. Printed work will go on at the same time, will prepare the prospect in advance of the call, will reinforce the effect of the call after it has been made. (Com. Ex. 2190-C)

Methods of reaching other groups were listed in part:

Newspapers must also be contacted. Here the contacts may be made both by cementmen and by representatives of the Public Relations Bureau.

Building materials dealers misunderstand the industry. They have no notion of the way the industry builds business for them—nor of the cost of that effort. Here cement company salesmen can be used. Suitable printed matter should be available for use at and after their calls.

The following groups will be informed largely by the printed word but also, to some extent, through addresses to civic, professional, and other bodies:

The public
Business leaders and financiers
Contractors
Engineers and architects (Com. Ex. 2190-D, E)

The necessity for convincing their own employees was also listed:

No matter how clever the planning, adroit the arguments and skillful the execution, no matter if the expenditure be most liberal, a public relations program will fail unless at least two fundamentals are complied with:

1. The proponents themselves must be fully convinced of the soundness of their case and of the need of presenting it.

Specifically, for us, we must "sell" the cement company executives and employees on

a. The necessity for our public relations program
b. The soundness of our selling practices
c. The contribution which the industry makes to individual and public welfare. (Com. Ex. 2190-E)

It suggested a study of marketing practices; the planning of contacts and addresses by the public relations officer; listed and described literature to be prepared and distributed; advocated the use of paid advertising, radio, and moving pictures; and outlined the organization and personnel thought necessary. It tabulated the "Approximate Number of Leaders of Groups to be Convinced" as:

1.	Federal officials	695
	State officials (including highway engineers)	291
2.	Newspapers—primary list	2,500
	—second class list	2,500
	Magazines and Journals	250
	General and Economic Writers	200
	Financial Editors and Writers	305
3.	U. S. Senators and Representatives	531
4.	State Senators	1,661
	State Representatives	5,662
5.	County Commissioners	8,704
	County Engineers	2,200
	Mayors and City Managers	5,750
	City Engineers	2,120
6.	Building Materials Dealers	about 30,000
7.	Civic Leaders	7,500
	Financiers	15,000
8.	Contractors, all lists	40,000
9.	Concrete Products Mfrs.	6,500
10.	Engineers (civil)	2,100
	Architects	14,500
11.	Cooperating Organizations	250
12.	Other industries on common ground	4,674
		153,853

(Com. Ex. 2190-J)

(e) At a meeting of the board of trustees of the Institute on August 15, 1934, Mr. Affleck reported that:

Representatives of the committee discussed the proposals either formally or informally in all districts but one east of the Rockies. Except in this district, (#10) the underlying strategy of the committee's proposals has been generally approved although some details have been changed in accordance with suggestions submitted.

also that a series of advertisements had been run in a number of publications, and:

In the series of eight ads, the first two were of an in-

troductory nature designed to get the good-will of the publishers and the readers and the subsequent ads were on various phases of our marketing practices. This series is completed.

The expenditure so far totals, in round figures, $30,000.

At the meeting in Chicago, the trustees of the Institute also empowered the committee to employ the personnel needed to study the necessary angles of this subject and to carry out a public relations program. On vote of the members of the Public Relations Committee, Colonel John B. Reynolds was employed as of August 1 to head up the Public Relations Bureau.

Temporarily the staff of the committee is headquartered at the offices of the Portland Cement Association in Chicago. This has the approval of the President of the Association. If there is any question about this, this may be a good time to discuss it.

As mentioned in the Report of the committee, a vote has been held in districts 1 to 9 inclusive. In some districts this was unanimous—in others it was by a large majority but not unanimous. It may be that representatives of districts 10, 11 and 12 present here today can advise regarding the status in their districts.

* * * The Status of the Public Relation Plan in Districts #10—#11 and #12 was as follows:

District #10—Trustee not present. Previous correspondence indicated disapproval.

District #11—No action taken.

District #12—All but two members approve. (Com. Ex. 621-D, E)

Some of the advertisements published as set out above claimed cement was playing a vital part in "Prolonging Our Lives" (Com. Ex. 434); claimed epochal improvements representing "Progress in Cement" (Com. Ex. 435); purported to explain price uniformity in "The 'Going' Price" (Com. Ex. 436), and the delivered price in "Buyers get what they want" (Com. Ex. 2836); compared price uniformity in cement with wheat prices in "wheat and cement" (Com. Ex. 2837); dealt with mill net in "The story of A, B and C" (Com. Ex. 2838), and with price uniformity in "The Same Economic Law" (Com. Ex. 2839).

(f) The reaction to these advertisements was not entirely favorable and the chairman of the marketing re-

search committee of the Institute, John Treanor, expressed his views in letters to Blaine S. Smith, president of Penn-Dixie, and E. J. Mehren, president of the Portland Cement Association, dated July 29, 1934, and July 31, 1934, respectively, in part:

I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed. * * * (Com. Ex. 938-Y.)

and

The worst that can be said is that the economic foundation for some of these discussions of price making is frail. With that opinion I am inclined to agree, believing that no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement. This is not a subject which can be presented to the public through advertising, or in any way. It is an argument that has to be made and can be made in special places where it may be calculated to do some good. (Com. Ex. 938-2A.)

Representations similar to those discussed by Mr. Treanor in the letters mentioned above had previously been characterized by him in his letter to B. H. Rader of the Code Authority on May 17, 1934, thus:

Do you think any of the arguments for the basing point system, which we have thus far advanced, will arouse anything but derision in and out of the government? I have read them all recently. Some of them are very clever and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy. The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined. * * * (Com. Ex. 7-B.)

(g) Having been unsuccessful in its efforts during the summer of 1934 to persuade the Federal Trade Commission to undertake a study of the basing-point system "with the cooperation of the cement industry" (Com. Ex. 958-M), the Institute proceeded to employ James M. Clark and

Arthur R. Burns, professors of economics at Columbia University, to make a study of the cement industry. In the early stages of this study Blaine S. Smith, president of Penn-Dixie, in writing to John Treanor, president of Riverside, stated in part:

Joe Young and I have been just now discussing the progress that has been made in connection with the survey of the industry now being conducted by Professors Clark and Burns, particularly in reference to your last two letters to me, copies of which have also been sent to other members of the Marketing Research Committee. (Com. Ex. 571-2L.)

He then referred to the suggestions in Mr. Treanor's two letters that each member of the committee "sit down individually and frame his own personal answers to several fundamental points raised by Dr. Clark," pointed out that if this were done "there is every reason to believe that the statements you would receive from the members of the Committee * * * would be at variance and possibly in direct conflict." He also stated:

Altho all of the members of the Committee in the East have had in mind the same objective that you evidently are striving for, namely attempting to mold the professors' minds before any definite conclusions have been reached, it has been our thought that much more could be accomplished by personal contact than through the medium of correspondence. The plan that we have discussed is simply to arrange a meeting shortly with the professors, to which would also be invited—in addition to the members of the Committee—certain sales and traffic experts with general knowledge and wide experience, preferably from companies other than those represented by the Committee. The professors could possibly prepare in advance a list of questions that had proved particularly bothersome. These questions could be submitted to the group of cement men and we would attempt to have those best qualified discuss the points involved with the professors until the matter was threshed out to everyone's satisfaction. * * *

* * * If you are inclined to agree with our views on this matter, will you kindly let me know when you next intend to be East, with the thought that a general meeting between the professors and the cement group could be arranged to suit your convenience.

Joe Young concurs in the thoughts expressed above. (Com. Ex. 571-2L, 2M.)

Members of the marketing research committee advised and collaborated with Professors Clark and Burns throughout the study and read for criticism and suggestions draft copies of various chapters in the proposed report. On May 25, 1937, Dr. Burns wrote Blaine S. Smith in part:

With further reference to my recent telephone conversation with you, I have now mailed mimeographed copies of the last two chapters of the study. * * *

There now remain four chapters which you have not seen. * * *

* * * I shall do my best to see that the whole of the balance of the study is handed to the stenographer before I leave. I imagine that this material will take some time to digest and that active discussions leading up to the final preparation of the material for publication can be taken up as soon as I return. (Com. Ex. 971-29D.)

The issuance of the complaint in this proceeding intervened and the report was not published.

Paragraph Twenty-two: (a) The record contains a very substantial volume of opinion testimony by economists concerning the application of the principles and theories of economics in hypothetical situations purporting to present factual situations shown to exist by the record in this proceeding. These witnesses: Edward A. Duddy, Frank A. Fetter, Benjamin A. Hibbard, Edwin G. Nourse, and Jacob Viner, called by the Commission; and Fred R. Fairchild, Ewald T. Grether, Clare E. Griffin, Roland S. Vaile, and Roy B. Westerfield, called by respondents, were by education, training, and experience qualified as experts to give such opinion testimony. In general, this testimony dealt with economic aspects of the multiple basing-point system, prices, various marketing practices, competition and its manifestations, and the economic effects of various marketing practices. It included detailed consideration of the theory of "imperfect competition"; of whether all forms of competitive rivalry, including those commonly designated as quality or service competition, in fact constitute "price competition"; of the principle of "indifference" where "each unit is of equal desirability," and the application of this theory to sellers and to buyers; whether or not the theory of uniform price for a standardized commodity in a competitive market has any application to identical bids or quotations, as distinguished from the price that results from the higgling of the market; of what

constitutes a market and the relative importance of the several elements thereof; of the significance of the lack of buyer participation in forming price; and of many other matters.

(b) In broad outline, the testimony of respondents' economic witnesses is to the effect that the multiple basing-point system, uniform delivered prices, and certain other phenomena of respondents' marketing practices as set forth in hypothetical questions, might be the result of or could result from natural evolution through the operation of competitive forces and do not give rise to an inference of collusion. On the other hand, also in broad outline, economic witnesses called by the Commission testified that the basing-point system, uniform delivered prices, and various other phenomena of respondents' marketing practices as set out in hypothetical questions, contravene a number of recognized principles of economics considered reliable indices of competition, and also that the existence of certain of those practices affirmatively indicated the absence of competition, and that as to others, planning and disciplinary means would be required for their continuation.

(c) It is concluded that, in the circumstances present in this proceeding, the recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized article sold to well-informed buyers does not serve to explain the identical delivered prices of respondents in the offering for sale and sale of cement. There is a well-recognized principle of economics that in the sale of units of equal desirability the seller will not accept less from one buyer than from another. Under the price pattern heretofore set out in detail, many of respondents' sales have the characteristics of "dumping." The principle that price uniformity may result from competition has not application to identical offers or sealed bids and cannot explain such uniformity. It is also true that uniformity of price in a given market is equally consistent with a condition of free competition or with a condition of monopoly. When—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is accepted by other sellers and there is no bargaining between buyers and sellers, fundamental requirements of a true market in the economic sense are lacking, and prices are not the result

of market action in a true economic sense but merely expressions of a non-competitive or monopolistic price structure.

Paragraph Twenty-Three: (a) The multiple basing-point delivered-price system used by the corporate respondents in the sale of cement is a discriminatory method of pricing. This is true whether the systematic variations in price are viewed before or after consideration is given to the cost of delivery by common carrier. The hypothetical illustration set out in subsection (g) of Paragraph Seven indicates the types of discriminatory price differences which are systematically exacted in order that each respondent may match the delivered price of other respondents at any given point. It will be observed by reference to this illustration that Mill A, being a basing-point mill, charges the sum of its base price plus freight to destination at all points where its base controls (Towns A, B, C, and D), but in order to match delivered prices in territory where the base of Mill C controls (Towns E, F, and G), it charges the sum of the Mill C base price plus freight from that mill to destination. Viewed from the aspect of Mill C, also a base mill, the result is the same. Mill B, a non-base mill, sells at delivered prices lower by various amounts in each town other than its home town. Turning to the mill net recovery of these mills for the cement sold, Mill A receives $1.50 at all points where its base governs but gets $1.30 in Town E, $1.10 in Town F, and only 90¢ in Town G. In reverse order, the same is true of Mill C. Mill B receives $1.80 in its home town, $1.60 in Town C and E, $1.40 in Towns B and F, and $1.20 in Towns A and G. Each mill shrinks its mill net by the amount necessary for it to match the delivered prices established pursuant to the aforesaid pricing system. It is plain that each mill sells at different delivered prices in different locations, and that the differences between many of these delivered prices are not the result of and do not correspond to the actual differences in the cost of delivery. It is equally plain that the mill nets received for cement from different customers, after giving consideration to the actual costs of delivery, also vary systematically and are discriminatory.

(b) The following tabulation illustrates the extent to which it is necessary, in the actual operation of the multiple basing-point delivered-price system, for respondents

to make variations in the mill nets recovered on different sales of cement in order to maintain identical delivered prices at each destination where sales are made. In the course of the Clark and Burns survey previously mentioned, many of the respondents submitted figures showing their shipments of cement in the months of June 1925, January 1928, June 1932, and January 1933—or such of those months as their records permitted—arranged to show the number of barrels on which the mill net was equal to or less by specified amounts than on sales in the home town of non-base mills, or the base prices of base mills. In this tabulation such figures as were furnished for the several months have been consolidated and the quantities sold in the several brackets are expressed in terms of percentage of the total sales of each mill during the months covered. The mills shown are the La Salle mill of Alpha (Com. Ex. 972-L), the Fogelsville mill of Lehigh (Com. Ex. 973-O), the Universal mill of Universal (Com. Ex. 973-2B), the Richard City mill of Penn-Dixie (Com. Ex. 972-U), and the Norfolk mill of Lone Star (Com. Ex. 972-O):

	Percentage of Total Sales				
Price	Alpha	Lehigh	Universal	Penn-Dixie	Lone Star
Base price	1.37	44.09	10.33	8.75	20.97
.01c to 5c below	20.73	6.97	11.68	.93	1.42
5.01c to 10c below	6.99	7.46	9.97	18.94	1.56
10.01c to 15c below	14.92	9.22	19.68	2.87	7.49
15.01c to 20c below	16.73	18.24	14.89	5.52	4.47
20.01c to 25c below	27.77	3.29	9.10	3.38	4.72
25.01c to 30c below	.94	2.40	10.82	6.58	4.63
30.01c to 35c below	.04	2.95	3.60	7.57	2.73
35.01c to 40c below	.07	1.45	3.70	10.13	4.60
40.01c to 45c below	.54	.72	3.33	3.51	24.52
45.01c to 50c below		.03	1.52	13.63	19.15
50.01c to 55c below			.13	9.54	1.25
55.01c to 60c below		.04	.29	4.75	.56
60.01c to 65c below			.47	1.45	.13
65.01c to 70c below				1.37	.74
Over 70c below				.99	.11

The above are merely examples, and corresponding data for other mills and other respondents would show similar results, varying in degree but not in principle. In some

cases particular mills receive on a portion of their sales amounts in excess of their base prices or equivalent net recovery. This may be due to various reasons such as premiums charged for delivery to trucks; or to delivery by owned or hired trucks at a cost less than the all-rail freight at which the delivered price was calculated; or to delivery by water shipment at rates less than the all-rail rate at which the delivered price was calculated; or to combinations of these factors.

(c) Under the pricing system used by respondents there was much cross-hauling of cement. The system contemplates, and in operation results in, each corporate respondent waiving his advantage in his natural sales territory in return for reciprocal waiver by the other corporate respondents. It tends toward maintaining a price level sufficiently high to permit individual corporate respondents to sell cement outside the territory naturally tributary to their respective mills. There is no way within practicable bounds of determining exactly how much cross-hauling actually occurs, and how much of the total sums paid by consumers for cement results from the additional cost of transportation on sales outside the natural territory of the seller. The Institute statistician, W. S. Mallory, made for the Clark and Burns study certain estimates "to obtain the probable freight loss in 1935 due to cross shipments of cement" in a limited territory and reported the results to the chairman of the marketing research committee of the Institute which had supervision of the study for the Institute. His estimate of such freight losses in Districts 1 and 2 for 1933 was $783,124.46 (Com. Ex. 971-28H). The conditions and assumptions underlying this estimate were stated, and it is obvious that the estimate materially understates the actual freight losses from the cause stated.

(d) At least since 1913 the cement industry has had a total productive capacity substantially in excess of total consumption. From 1921 to 1931 there was a steady and rapid rise in productive capacity which increased the total annual industry capacity by more than 100,000,000 barrels. In 1928, the year of largest consumption, productive capacity exceeded consumption by approximately 25 percent, and between 1931 and 1937, inclusive, consumption has represented less than half of productive capacity.

(e) As heretofore pointed out, in 1932 and 1933, at a time when consumption of cement amounted to less than

30 percent of capacity and had been declining rapidly during the economic depression then existing, respondents made numerous and substantial increases in their prices for cement. Many of the base prices established during the series of price advances which ended early in 1933 were still in effect, unchanged, in 1938. In the case of other bases, with but a few exceptions, only minor readjustments have been made since early in 1933 and prices have remained unchanged over varying numbers of years. Cement prices have shown a high degree of rigidity.

(f) After considering the testimony and other evidences offered by respondents in explanation of these conditions, including that concerning the use of cement in connection with other materials, as well as that relating to shifting location of demand for cement, it is concluded that the general conditions shown to exist tend to coincide with, rather than contradict, the direct proof of restraints imposed upon competition by respondents.

Paragraph Twenty-four: (a) Count II of the complaint charges that the multiple basing-point system of delivered prices alleged in Paragraphs Four and Five of Count I constitutes a combination of respondents to discriminate in price which results, and has resulted, in discriminations in price in the sale of cement by the respective respondents in violation of subsection (a) of Section 2 of the Clayton Act as amended. Count II alleges that the delivered prices at which sales are made pursuant to the multiple basing-point delivered-price system "are not the actual prices received by producing respondents," that to derive the true price received by respondents "the price actually paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price," that sales are made "at almost as many true prices as there are customers' locations," that the respective sellers thus discriminate in price in substantial amounts among their customers, that the purpose and effect of these discriminations is to prevent, lessen, and destroy competition in price among respondents, and that it is only through these discriminations that respondents are "enabled to eliminate price competition." This count further alleges that such discrimination in price is the result of respondents' combination to use the multiple basing-point delivered-price system and that under this system each respondent knows that in reciprocity for its omission to offer a competitive price to customers

located in areas adjacent to its mill, where it has a natural advantage and receives its highest actual price, other respondents will reciprocally waive their advantages and thus the advantages and disadvantages of each will be neutralized "in order that there may not anywhere be genuine competition in price."

(b) Upon consideration of the record, the Commission finds that each material allegation of Count II, and in particular each of the above-described allegations, is sustained by the evidence. As heretofore pointed out, the discrimination in mill nets by each respondent seller forms a systematic pattern that is the mathematical counterpart of the delivered-price pattern resulting from the multiple basing-point delivered-price system, which system is an expression of the effort of each respondent seller to match the delivered prices of other respondent sellers. It would be impossible for respondents to maintain their multiple basing-point delivered-price system without automatically creating this systematic pattern of discrimination in mill nets in the sales of each respondent seller. The degree of the mill net discriminations among customers of the respective respondent sellers, as heretofore set out, ranges from a fraction of a cent to amounts substantially in excess of $1 per barrel, and commonly amounts to 25¢ to 50¢ per barrel. Higher mill nets are always exacted from customers closer freightwise to the seller than from customers at more distant points. It would be impossible for any of respondent sellers habitually and openly to obtain these widely varying mill nets in the form of f.o.b. mill prices, and any attempt so to do would undoubtedly arouse a storm of protest from purchasers.

(c) The evidence shows that respondents have for many years pursued a course inconsistent with any conclusion other than that they recognized mill nets as being the true prices of and for cement. This recognition has been evidenced in many ways. As stated in subsections (a) and (c) of Paragraph Twelve, purchasers of cement generally and customarily paid the freight charges thereon directly to the common carrier and paid to the seller only the amount of the invoice after deducting the amount of the freight paid to the carrier. This was the regular and consistent practice until some time after the issuance of the complaint in this proceeding. As found in subsection (e) of the same paragraph, respondents sought, by con-

cert of action among themselves, to avoid the risks and responsibilities of ownership of cement in transit to the purchaser and by contract to impose such risks and responsibilities on the purchaser. These and other actions of respondents have signified their intention to pass title to cement sold to the purchaser at the time of delivery to the common carrier and at the mill nets applicable to purchasers at particular destinations. In the ordinary course of their business respondents have referred to mill net as the price of cement and have used that term as the equivalent of and interchangeably with price. An illustration of this appears in a letter dated July 26, 1935, from Superior to Professor Arthur R. Burns in which it was stated:

This freight rate of course; does not in any way accrue to us and the net price for our cement at such a delivery point, in fact the only price that is of any advantage to us, is the cement price stripped of freight, package and discount, which of course in my own mind becomes the selling price so far as we are concerned. (Com. Ex. 971-17P)

The accounting practices of respondents have been consistent only with the conclusion that they recognized mill net as the true price of cement. Mill net being the only part of the delivered price ordinarily received from the buyer and passed through the seller's books as sales income, the total of mill net sales becomes the total sales income with which total costs may be compared to ascertain profit or loss. Respondent sellers have been accustomed to compare average mill net per barrel, as well as mill net per barrel on particular sales, with average cost per barrel. Economic experts testified that under the course of business pursued by respondents, mill net is the true price of cement. Economic experts produced by respondents testified that the amount of price discrimination cannot be determined or expressed except in terms of mill net.

(d) The use of the multiple basing-point delivered-price system by respondents for the purpose and with the effect of producing identical delivered prices at any given destination and thereby avoiding price competition, precludes any defense of the systematic variations in mill nets as being made in good faith to meet an equally low price of a competitor. On the contrary, these systematic variations are made in order that the delivered prices of all

respondents selling at any given location may be equally high and equally low. As has been heretofore pointed out, if respondents' delivered prices were treated as true prices they would not reflect due allowance for differences in the cost of delivery. The use of the formula of lowest combination of base price plus freight precludes due allowance being made for differences in actual cost of delivery in all cases where the point of shipment is not that of the governing base mill upon which the delivered price was calculated. The failure to make due allowance for cost of delivery in such delivered prices automatically reflects itself in the varying mill nets. The systematic variations in mill nets resulting from respondents' pricing system are conditioned upon and are in proportion to the failure of the respective respondent sellers to make due allowance in their delivered prices for differences in their actual costs of delivery.

(e) The Commission rejects respondents' contention that the legislative history of the Robinson-Patman Act shows an intention on the part of the Congress to legalize whatever price discriminations are involved in respondents' multiple basing-point delivered-price system. The failure of Congress to define price as mill net, on which failure respondents rely, does not avoid the necessity of having some definite concept of price in performing the administrative duty of preventing price discrimination under the statute. In the circumstances of this case, whether price be considered as delivered price under respondents' pricing system or as mill net, there are price discriminations which cannot be explained or justified by differences in cost of delivery and which reflect nothing but respondents' plan and effort to make their delivered prices identical at each destination. Among the reasons for rejecting respondents' contention is the fact that its acceptance would attribute to Congress the contradictory intention of prohibiting discrimination that fail to make due allowance for differences in cost of delivery and, at the same time, legalizing them. To accept respondents' contention would be to recognize the right of a combination engaged in suppressing price competition to define and treat the word "price" in a manner that promotes and is inextricably interwoven with its price-fixing objectives.

Paragraph Twenty-five: The Commission concludes from the evidence of record and therefore finds that in the

circumstances of this case the systematic discriminations in mill nets by each respondent seller among its various customers which necessarily result from the use of the multiple basing-point delivered-price system are discriminations in price that are unlawful under subsection (a) of Section 2 of the Clayton Act as amended; that the effect of such discriminations in price has been and may be substantially to lessen competition and tend to create a monopoly in the sale and distribution of cement, and has been and may be to injure, destroy, and prevent competition with respondents who grant and exact such discriminations; that such discriminations do not make due allowance for differences in the cost of delivery or for other differentials permitted by subsection (a) of Section 2 of said Act; and that such discriminations are not made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of Section 2 of said Act.

Paragraph Twenty-six: The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental, of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; to prevent purchasers from utilizing motor trucks or water carriers for the transportation of cement and from obtaining benefits which might accrue from the use of such transportation agencies; to require that purchases of cement be made on a delivered price basis, and to prevent and defeat efforts of purchasers to avoid this requirement; frequently to deprive agencies of the Federal Government of the benefits of all or a part of the lower land-grant rates available to such purchasers; to require certain agencies of the Federal Government to purchase their requirements of cement through dealers at higher prices than are available in direct purchases from manufacturers; to establish and maintain an agreed classification of customers who may pur-

chase cement from manufacturers thereof; to maintain uniform terms and conditions of sale; to hinder and obstruct the sale of imported cement through restraints upon those who deal in such cement; and otherwise to promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use.

Conclusion.

The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by respondents, as hereinabove set out, constitute violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by Act approved June 19, 1936 (the Robinson-Patman Act).

By the Commission.

R. E. Freer,
Acting Chairman.

(Seal)

Dated this 17th day of July, A. D. 1943.

Attest:

Otis B. Johnson,
Secretary.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of July, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—3167) * *

ORDER TO CEASE AND DESIST.

(Entered July 17, 1943.)

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, various motions and appeals, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act and of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that respondent The Cement Institute, an unincorporated association, its officers, trustees, agents, representatives, and employees, and the corporate respondents Aetna Portland Cement Company, Alpha Portland Cement Company, Arkansas Portland Cement Company, Ash Grove Lime & Portland Cement Company, Beaver Portland Cement Company, The Bessemer Limestone & Cement Company, Calaveras Cement Company, California

Portland Cement Company, Colorado Portland Cement Company, Consolidated Cement Corporation, Coplay Cement Manufacturing Company, Cumberland Portland Cement Company, Dewey Portland Cement Company, Diamond Portland Cement Company, Edison Cement Corporation, The Federal Portland Cement Company, Inc., Florida Portland Cement Company, Georgia Cement & Products Company, Giant Portland Cement Company, The Glens Falls Portland Cement Company, Great Lakes Portland Cement Corporation, Green Bag Cement Company of Pennsylvania, Green Bag Cement Company of West Virginia, Hawkeye Portland Cement Company, Hercules Cement Corporation, Hermitage Portland Cement Company, Huron Portland Cement Company, Idaho Portland Cement Company, Lone Star Cement Corporation (the corporation named in the complaint as International Cement Corporation), Keystone Portland Cement Company, Kosmos Portland Cement Company, Lawrence Portland Cement Company, Lehigh Portland Cement Company, Marquette Cement Manufacturing Company, Medusa Portland Cement Company, Missouri Portland Cement Company, The Monarch Cement Company, Monolith Portland Cement Company, Monolith Portland Midwest Company, National Cement Company, Nazareth Cement Company, Nebraska Cement Company, North American Cement Corporation, Northwestern Portland Cement Company, Northwestern States Portland Cement Company, Oklahoma Portland Cement Company, Oregon Portland Cement Company, Pacific Portland Cement Company, Peerless Cement Corporation, Pennsylvania-Dixie Cement Corporation, Petoskey Portland Cement Company, Pittsburgh Plate Glass Company, Portland Cement Company of Utah, Riverside Cement Company, Santa Cruz Portland Cement Company, Signal Mountain Portland Cement Company, Southern States Portland Cement Company, Southwestern Portland Cement Company, Spokane Portland Cement Company, Standard Portland Cement Company, Superior Cement Corporation, Superior Portland Cement, Inc., Three Forks Portland Cement Company, Trinity Portland Cement Company, Union Portland Cement Company, Universal Atlas Cement Company, Valley Forge Cement Company, Volunteer Portland Cement Company, Vulcanite Portland Cement Company, Wabash Portland Cement Company, West Penn Cement Company, The Whitehall Cement Man-

ufacturing Company, Wolverine Portland Cement Company, and Yosemite Portland Cement Corporation, their respective officers, agents, representatives, and employees, in or in connection with the offering for sale, sale, and distribution of portland cement in interstate commerce, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Quoting or selling cement at prices calculated or determined pursuant to or in accordance with the multiple basing-point delivered-price system; or quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents.

2. In connection with or in aid or support of any plan, system, acts, or practices prohibited in paragraph 1 above

(a) Refusing or declining to quote or sell cement at the location of the producing mill at a price effective at such location.

(b) Refusing or declining, when quoting or selling cement at a price effective at the location of the producing mill, to allow purchasers to provide transportation by any means, at any cost, or to any place they may desire.

(c) Quoting or selling cement at f.o.b. mill prices calculated by deducting actual common-carrier transportation charges from delivered-price quotations or delivered prices which are equivalent to the sum of the base price at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(d) Quoting or selling cement ostensibly at f.o.b. mill prices, but which prices, plus common-carrier transportation charges to purchasers' destinations, are systematically equivalent to identical delivered costs to such purchasers from differently located mills.

(e) Quoting or selling cement at delivered prices calculated as or systematically equivalent to the sum of the

base price in effect at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(f) Quoting or selling cement at delivered prices which systematically include a common-carrier transportation factor greater or less than the actual cost of such common-carrier transportation from the point of shipment to destination.

(g) Quoting or selling cement at delivered prices which systematically include a freight factor representing transportation by a common carrier having higher rates than the means of transportation actually employed.

(h) Quoting or selling cement at destination-cost figures accompanied by a requirement that for invoicing purposes the f.o.b. mill price shall be determined by making specified deductions from said destination cost figures.

(i) Quoting or selling cement to any instrumentality of the Federal Government in a manner or upon terms which deprive the Government of all or any part of the benefits of land-grant or other special common-carrier rates to which it may be lawfully entitled.

(j) Collecting, compiling, circulating, or exchanging information concerning common-carrier transportation charges for cement used or to be used as a factor in the price of cement, or using, directly or indirectly, any such information so compiled or received as a factor in the price of cement.

(k) Controlling or attempting to control the destination or use of cement after the acquisition of title thereto by the purchaser.

(l) Determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

(m) Determining upon the projects or types of projects for which, or the purchasers or classes of purchasers to whom, sales of cement will or will not be made directly by respondents.

(n) Collecting, compiling and circulating, or exchanging statistical data which reveal the individual production, stocks, sales, or shipments of cement of any corporate respondent to other corporate respondents.

(o) Maintaining any form of espionage for the purpose of determining whether or not their customers purchase or deal in imported cement; or discontinuing or threatening

to discontinue sales of cement to customers because they purchase or deal in imported cement.

(p) Determining upon any discounts, package charges or refunds thereon, or other terms or conditions of sale, or using any discounts, package charges or refunds thereon, or other terms or conditions of sale so determined.

3. Discriminating in price between or among their respective customers by systematically charging and accepting mill net prices which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents.

4. Using any means substantially similar to those specifically set out in this order with the purpose or effect of accomplishing any of the things prohibited by this order.

It Is Further Ordered that, for the reasons set out in the findings as to the facts in this proceeding, the case growing out of the complaint herein be, and the same hereby is, closed as to respondent Castalia Portland Cement Company without prejudice to the right of the Commission, should future facts so warrant, to reopen the same and resume trial thereof in accordance with its regular procedure.

It Is Further Ordered that respondents shall, within sixty (60) days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

8360.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

AETNA PORTLAND CEMENT COMPANY, ET AL.,
Petitioners,

against

FEDERAL TRADE COMMISSION,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

Filed July 26, 1943. Kenneth J. Carrick, Clerk.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed July 26, 1943.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your petitioners (corporations duly organized in the respective states indicated), Aetna Portland Cement Company, (Maine), Alpha Portland Cement Company, (New Jersey), Arkansas Portland Cement Company, (Arkansas), Ash Grove Lime and Portland Cement Company, (Maine), Bessemer Limestone and Cement Company, (Ohio), Colorado Portland Cement Company, (Colorado), Consolidated Cement Corporation, (Delaware), Coplay Cement Manufacturing Company, (Pennsylvania), Cumberland Portland Cement Company, (Delaware), Dewey Portland Cement Company, (West Virginia), Diamond Portland Cement Company, (Ohio), Edison Cement Corporation, (a New Jersey corporation until December 22, 1942 when it was formally dissolved), Federal Portland Cement Company, Incorporated, (New York), Florida Portland Cement Company, (Delaware), Georgia Cement and Products Company, (Georgia), Giant Portland Cement Com-

pany, (Delaware), Glens Falls Portland Cement Company, (New York), Great Lakes Portland Cement Company, (Indiana), Green Bag Cement Company of West Virginia, (West Virginia), Green Bag Cement Company of Pennsylvania (Pennsylvania), Hawkeye Portland Cement Company, (West Virginia), Hercules Cement Corporation, (Pennsylvania), Hermitage Portland Cement Company, (Delaware), Idaho Portland Cement Company, (Idaho), Keystone Portland Cement Company, (Pennsylvania), Kosmos Portland Cement Company, (Kentucky), Lawrence Portland Cement Company, (Pennsylvania), Lehigh Portland Cement Company, (Pennsylvania), Lone Star Cement Corporation, (Maine), Medusa Portland Cement Company, (Ohio), Missouri Portland Cement Company, (Missouri), Monarch Cement Company, (Kansas), National Cement Company, (Alabama), Nazareth Cement Company, (Pennsylvania), Nebraska Cement Company, (Delaware), North American Cement Corporation, (Delaware), Northwestern States Portland Cement Company, (Iowa), Oklahoma Portland Cement Company, (Oklahoma), Oregon Portland Cement Company, (Nevada), Peerless Cement Corporation, (Michigan), Pennsylvania-Dixie Cement Corporation, (Delaware), Petoskey Portland Cement Company, (Delaware), Pittsburgh Plate Glass Company, (Pennsylvania), Portland Cement Company of Utah, (Wyoming), Signal Mountain Portland Cement Company, (Delaware), Southern States Portland Cement Company, (Georgia), Southwestern Portland Cement Company, (West Virginia), Standard Portland Cement Company, (Ohio), Superior Cement Corporation, (Ohio), Three Forks Portland Cement Company, (Montana), Trinity Portland Cement Company (West Virginia), Union Portland Cement Company, (Utah), Valley Forge Cement Company, (Pennsylvania), Volunteer Portland Cement Company, (Delaware), Vulcanite Portland Cement Company, (New Jersey), Wabash Portland Cement Company, (Indiana), West Penn Cement Company, (Pennsylvania), Whitehall Cement Manufacturing Company, (Pennsylvania), Wolverine Portland Cement Company (Michigan), by their attorneys and jointly and severally present their petition to review and set aside the Order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on the 17th day of July, 1943, and in support thereof respectfully show:

I.

Nature of the Proceedings as to which Review is Sought.

First: The Order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute, an unincorporated trade association, its president and former secretary, its officers and trustees, and seventy-five (75) corporations engaged in the manufacture or sale of Portland cement, all of whom are alleged to be members of The Cement Institute. Your petitioners comprise fifty-nine (59) of the aforesaid Portland cement companies.

A. The Commission's Complaint.

Second: The Commission's complaint contains two counts, both founded upon the charge that petitioners and their co-respondents have maintained a nation-wide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Third: Count I of the complaint refers to "what is known as the multiple basing point system of pricing", as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further that the alleged agreed use of this so-called "multiple basing point system" results in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

Fourth: Count I of the complaint also alleges that your petitioners and their co-respondents have agreed to use various enumerated practices and means in pursuance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: an agreement to

determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates and with the result that the official tariffs are allegedly nullified; an agreement to prevent the use by customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit, it being charged that "diversions" result in concessions in delivered prices to the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to thwart the efforts of the United States Government to secure f.o.b. mill prices on cement; and the interpretation and formulation by The Cement Institute of official policies for the industry.

Fifth: Count I also sets out a number of specific effects which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: the maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

Sixth: Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing". It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged variations in such mill nets, which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

B. Petitioners' Answers.

Seventh: Separate answers to the complaint were filed by each of your petitioners (except for six related companies which submitted a joint answer) and by The Cement Institute and each of the other Portland cement companies who were respondents below.

Eighth: Although petitioners' separate answers vary in their allegations and scope, they are the same in several fundamental respects, namely: they all deny the existence of the conspiracy which is charged; they all deny the existence of a "multiple basing point system", or any other system of pricing; they all deny that there is any agreement or understanding with respect to their various practices and marketing methods; they all deny the existence of any cooperative means allegedly adopted to support and implement the alleged combination; they all deny any influence of The Cement Institute upon the marketing or pricing policies and practices of its members; they all deny the existence of an artificial price level or excessive prices for cement; they all deny that their acts have hindered, lessened or restrained competition, and that they constitute an unfair method of competition; they all deny the alleged illegal discrimination in price; and they all deny each and all of the alleged effects of the combination and injury to competition and to the public.

Ninth: The individual answers of many of your petitioners contain affirmative defenses which describe and explain their respective practices and policies with respect to the sale and distribution of cement. Considered collectively for the purposes of this petition said affirmative defenses may be summarized as follows (Paragraphs Tenth to Fourteenth inclusive):

Tenth: The answers state that for over 35 years it has been customary to sell cement largely at delivered prices, but they allege that delivered prices have not been used exclusively and they deny that f.o.b. mill prices have been unavailable. They allege that the extensive use of delivered prices has not resulted from the use of any pricing system, nor from any agreement, understanding or combination, and that it is not in any sense an artificial or arbitrary method of sale. Some of the answers of your petitioners state that their own delivered prices for cement in a given area when freight is deducted have often re-

flected a constant figure at their mill; that when that occurs that mill has sometimes been referred to as a "base mill"; and that the constant figure reflected has sometimes been called a "base price". The answers allege that such so-called "basing points" as may have from time to time been reflected in some delivered prices, have not been arbitrarily determined, have never been fixed in number or geographical location, and have not been the result of any agreement or understanding. The answers allege further that many delivered prices for cement do not and never have reflected any such constant or base figure and that many mills have never been so-called "base mills."

Eleventh: The answers agree, as alleged in the complaint, that Portland cement is a standardized commodity with no brand able to command a higher price (even one cent higher) than another brand and that it is a heavy, bulky commodity in which transportation charges constitute a substantial part of the cost to the buyer. The answers aver that, buyers therefore, determine the brand they will purchase on the basis of the lowest cost to them delivered at their destination, and that as a result the forces of competition have come to be focused at the multitude of destinations—cities, towns and villages all over the country—where cement is used. The answers allege that, accordingly, the cement manufacturer, in order to meet competition, ordinarily quotes prices with reference to each destination and that the lowest known price quoted by any seller at the buyer's destination, irrespective of how that price may have been arrived at, must be met by any competitor who desires to sell his cement at that destination. Extensive use of delivered prices is alleged to be the natural result of this necessity for meeting competition at the buyer's destination.

Twelfth: The answers allege further that cement prices are quoted openly to dealers, contractors and other similar large scale operators who are buyers of cement, and each of these buyers is solicited by and purchases from several manufacturers. They allege that the lowest price of any brand, therefore, becomes a matter of general knowledge and with such knowledge available, attended by the necessity of meeting the lowest price, identity of cement prices at a given market at a given time is the natural competitive result.

Thirteenth: The answers of the respective petitioners allege that all of their methods and practices have been developed independently under the stress of active competition in individual markets. They allege further that their pricing methods are highly competitive and in the best interests of all concerned in the production, sale and use of cement.

Fourteenth: Respecting Count II the answers allege that "price" in the Robinson-Patman Act does not mean mill net as alleged in the complaint, and that, the "price" of cement is the amout paid by the buyer for cement delivered at destination. They allege that there has been no injury either to buyers or sellers of cement, and that when sales are made by any cement producer at a price identical with those of any other sellers; such producer is either meeting, in good faith, the price of a competitor or its price is being met by competitors.

Fifteenth: All the answers reserve the right to move to dismiss the complaint for lack of jurisdiction.

C. Hearings and Argument Before the Commission

Sixteenth: Beginning on December 1, 1937, evidence was taken before a Trial Examiner appointed by the Commission at various cities throughout the country. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioners and their co-respondents was taken between September 5, 1939 and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940 and November 29, 1940, and on the latter date, the hearings were concluded.

Seventeenth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made individually on behalf of each of your petitioners and each of their co-respondents, at the close of the Commission's case in chief. The Commission denied these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, your petitioners and their co-respondents on January 27, 1941,

filed a statement of Contentions and responded to a questionnaire submitted to them by the Trial Examiner, with respect to the facts proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence". Some exceptions to the Trial Examiner's report were filed in writting on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioners and their co-respondents. After the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence were renewed. The Commission under date of July 17, 1943 denied each and every one of the aforementioned motions and exceptions.

D. The Order Sought to be Reviewed and Set Aside

Eighteenth: On July 17th, 1943, the Federal Trade Commission issued, and subsequently served upon petitioners its Findings as to the facts and Conclusion and its Order to Cease and Desist entered thereon. A copy of said Findings, Conclusion and Order is annexed hereto and made a part hereof as Exhibit "A".

II.

Facts and Statutes upon which Venue is Based.

A. The Statutes.

Nineteenth: The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U.S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U.S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid) and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid). Sec. 225, Title 28, U.S. Code, aforesaid, provides in paragraph (e)):

"The Circuit Courts of Appeal are further empowered

to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c). Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have jurisdiction of the proceeding and of the question determined therein, * * *"

Section 21 of Title 15, provides in part:

"* * * the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board.

* * * * *

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided."

B. The Facts as to Venue

Twentieth: By reason of the charge of conspiracy and combination, all of your petitioners and all of their co-respondents have allegedly maintained and used in this Circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute, of which your petitioners and their co-respondents, are alleged to have been members maintains, in this Circuit, at Chicago, Illinois, its principal office and also a Freight Rate Bureau for compiling and publishing freight rate books allegedly employed in connection with the alleged unfair method of competition and discriminatory pricing method. Numerous acts, imputed to your petitioners and all of their co-respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

Twenty-first: Your petitioners, Aetna Portland Cement Company, Alpha Portland Cement Company, Consolidated Cement Corporation, Dewey Cement Company, Kosmos Portland Cement Company, Lehigh Portland Cement Company, Lone Star Cement Corporation, Medusa Portland Cement Company, Missouri Portland Cement Company, Northwestern States Portland Cement Company, Peerless Portland Cement Company, Petoskey Portland Cement Company, Pittsburgh Plate Glass Company, Southwestern Portland Cement Company, Superior Cement Corporation, Wabash Portland Cement Company and Wolverine Portland Cement Company, carry on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act in that they are regularly engaged in the distribution and sale of Portland cement to purchasers in areas in this Circuit. Moreover the following of your aforesaid petitioners maintain plants for the manufacture of Portland cement at the places in this Circuit hereinafter indicated: Alpha Portland Cement Company, at La Salle, Illinois; Lehigh Portland Cement Company, at La Salle, Illinois and Mitchell, Indiana; Lone Star Cement Corporation, at Limedale, Indiana; Medusa Portland Cement Company, at Dixon, Illinois; Wabash Portland Cement, at Stroh, Indiana. Your petitioner, Consolidated Cement Corporation, aforesaid, also

has its principal place of business and main office in this Circuit at Chicago, Illinois.

Twenty-second: Your petitioner, Florida Portland Cement Company carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act in that it has its principal place of business and main office in this Circuit, at Chicago, Illinois.

Twenty-third: Your petitioners, Great Lakes Portland Cement Company and Wabash Portland Cement Company, reside in this Circuit in that they are corporations duly organized under the laws of the State of Indiana.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid Findings, Conclusions and Order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray:

1. That a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the Findings as to the Facts and Conclusion and the Order to Cease and Desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's Report upon the Evidence and the Exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and their co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's Report upon the evidence, the Exceptions filed thereto by and on behalf of petitioners and their co-respondents, the several motions made on behalf of petitioners and their

co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss the Complaint issued by it against your petitioners.

Dated: July 24, 1943.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Cement Institute, an unincorporated association, S. W. Storey, G. H. Reiter,

Petitioners,

against

Federal Trade Commission,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

(Filed July 26, 1943. Kenneth J. Carrick, Clerk.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

The Cement Institute, an unincorporated association, S. W. Storey, G. H. Reiter,

Petitioners,

against

Federal Trade Commission,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your petitioners, The Cement Institute, an unincorporated association (hereinafter called the "Institute"), S. W. Storey and G. H. Reiter, by their attorneys, and jointly and severally present their petition to review and to set aside the Order of the Federal Trade Commission (hereinafter referred to as the "Commission") made and entered on the 17th day of July, 1943, requiring your petitioners and others to cease and desist from engaging

in an alleged unfair method of competition in violation of Section 45, Title 15, U. S. Code, known as the Federal Trade Commission Act, and an alleged discrimination in price in violation of Section 13, Title 15, U. S. Code, known as the Clayton Act as amended by the Robinson-Patman Act, and in support thereof respectfully show:

I. Nature of the Proceedings as to Which Review Is Sought

First: The order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against your petitioners the Institute, S. W. Storey and G. H. Reiter as "President" and "Secretary" thereof respectively, the officers and trustees of the Institute, and seventy-five Portland cement companies (hereinafter sometimes called "cement producers"), alleged to be members of the Institute.

Second: The Commission's complaint contains two counts, both founded upon the charge that your petitioners and their co-respondents have maintained a nationwide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II it is charged that the cement producers, whenever they quote prices under the alleged "system", discriminate in price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. Count II of the complaint does not relate to your petitioners since it is not alleged that they have discriminated in price in violation of the Robinson-Patman Act.

A. Count I of the Complaint

Third: The complaint alleges that the Institute is an unincorporated trade association organized in October 1929 which is not engaged in commerce but is engaged in aiding the producing respondents to carry out alleged unlawful methods which substantially affect competition among its members. The complaint does not charge that the Institute has used a "basing point system" or any other "system" or method of pricing.

Fourth: The only specific allegations contained in the complaint regarding your petitioners are the following:

that, in pursuance of and in support of the alleged conspiracy to maintain the so-called "multiple basing point system of pricing", the Institute has prepared and distributed among cement producers freight rate books which are alleged to be used, by agreement, in determining the freight factor which will be used by them in quoting prices; that it is the function of the Institute to formulate and interpret the policies of its member companies and that Institute meetings were used for this purpose and to promote the alleged conspiracy; and finally, that by united action, public advertisements were published to camouflage the alleged combination.

B. Petitioners' Answer

Fifth: Petitioners' answer alleges that the Institute is not engaged in the manufacture and sale of cement and that it has not employed basing points, a "basing point system", or any other marketing or pricing method. Petitioners' answer also denies the existence of the conspiracy charged in the complaint and sets out an affirmative defense describing the Institute and explaining its function and activities as more fully set forth in Paragraphs Sixth to Eleventh, herein inclusive.

Sixth: Petitioners' answer alleges that the work of the Institute has, in the main, been purely mechanical and largely statistical, that it has never influenced or endeavored to influence the marketing policies of its members and that it has not promoted, aided or participated in any agreement or understanding concerning the pricing or marketing methods of its members or any others.

Seventh: Petitioners' answer alleges further that the Institute was organized in August of 1929; that its purposes were set forth in Articles of Association which were adopted at or about that time; that Article II of said Articles set forth the purposes of the Institute as follows:

"To promote the best interests of the cement industry by providing facilities for collecting information with respect to trade and commerce therein, and disseminating such information. The information so collected and disseminated, shall be as follows:

(a) Information concerning credits.

(b) Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement.

(c) Information concerning production and stocks on hand of clinker and Portland Cement and shipments of Portland Cement, and cloth sack returns."

Eighth: Petitioners' answer denies the charges in the complaint respecting the purpose and use of the freight rate books and alleges that in or about March 1930 the Institute established Freight Rate Bureaus for the purpose of publishing books and interim amendments thereto which showed all-rail freight rates on cement compiled from official carload freight rates on cement, expressed in cents per one hundred pounds, between points of actual shipments and points of actual destination, and that such books have been compiled and prepared for all states except the States of Washington, Oregon, California, Arizona, Nevada, Utah, Colorado, Wyoming, Montana and Idaho.

Ninth: It is alleged further in petitioners' answer that with the enactment of the National Industrial Recovery Act, the Institute became active in bringing together the producers of cement for the purpose of formulating a code of fair competition, as authorized by the Act; that an NIRA code for the Cement Manufacturing Industry was approved by the President of the United States on November 27, 1933; and that the Institute, although continuing its freight rate and statistical services, offered and devoted most of its facilities to the Cement Code Authority during the existence of the NIRA.

Tenth: Petitioners' answer further alleges that from the time the NRA codes were invalidated by the United States Supreme Court the activities of the Institute were curtailed and limited to statistics on production, shipments and stocks on hand, the compilation and distribution of freight rate books, as aforesaid, specific job contract information (discontinued in September 1936) and the distribution of information to members on pending or recently enacted legislation and governmental regulations.

Eleventh: Petitioners' answer further alleges that the application of the doctrine of stare decisis to the decision in the case of Cement Manufacturers Protective Association v. United States, 268 U. S. 588 (1925), establishes that all of the purposes and activities of the Institute have been specifically approved by the Supreme Court of the United States.

Twelfth: The answer of these petitioners further alleges that they are not engaged in commerce and have not

engaged in any discriminations in price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

C. Hearings and Argument Before the Commission

Thirteenth: Beginning on December 1, 1937, evidence was taken at various cities throughout the country, before an Examiner appointed by the Commission. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioners and their co-respondents was taken between September 5, 1939 and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940 and November 29, 1940 and on the latter date, the hearings were concluded.

Fourteenth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made individually on behalf of each of your petitioners and each of their co-respondents, at the close of the Commission's case in chief. The Commission denied each of these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, your petitioners and their co-respondents on January 27, 1941, filed a Statement of Contentions and responded to a questionnaire submitted to them by the Trial Examiner, with respect to the facts proved. In May 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioners and their co-respondents. After the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence, were renewed. All of these motions and exceptions were denied by the Commission.

D. The Order Sought to be Reviewed and Set Aside

Fifteenth: On July 17, 1943, the Federal Trade Commission issued, over the signature of its Secretary, and caused to be served upon petitioners its Findings as to the Facts and Conclusion and its Order to Cease and Desist entered thereon. A copy of the Order is annexed hereto and made a part hereof as Exhibit "A."

II. Facts and Statutes Upon Which Venue Is Based

Sixteenth: The statutes under which this Court has jurisdiction and venue are Section 225, Title 28 United States Code (Section 128 of the Judicial Code, as amended) and Section 45, Title 15, United States Code (Section 5 of the Federal Trade Commission Act aforesaid). Section 225, Title 28 of the United States Code aforesaid, provides:

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c). Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have the jurisdiction of the proceeding and the question determined therein, * * *."

Seventeenth: Your petitioner, the Institute, is engaged solely in the collection and publishing of statistics with respect to production, shipments, and stocks on hand of Portland cement as well as the publishing of freight rate

books showing all freight rates on Portland cement, compiled from official tariffs. The Institute resides and carries on business in this circuit within the meaning of Section 5 of the Federal Trade Commission Act, aforesaid, in that it maintains at Chicago, Illinois, its principal office and a Freight Rate Bureau for compiling and publishing the aforesaid freight rate books.

Eighteenth: S. W. Storey and G. H. Reiter were named as respondents in the Commission's complaint "as president" and "as secretary", respectively of the Institute. Your petitioner S. W. Storey is president of the Institute and held that office at the time the Commission's complaint was filed. S. W. Storey resides in this Circuit. Your petitioner G. H. Reiter does not now and did not at the time of the complaint hold any office in the Institute, but, for a short period prior to April, 1937 he was secretary and general manager of the Institute and the Commission found that he performed a number of the acts in question in this Circuit.

III. Prayer for Relief

Wherefore, believing that the aforesaid Findings, Conclusion and Order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray that this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and their co-respondents in the course of the proceeding before the Trial Examiner, the Trial Examiner's report upon the evidence, the Exceptions filed thereto by and on behalf of your petitioners and their co-respondents, the several motions made on behalf of petitioners and their co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings as to the Facts and Conclusion, and set aside and vacate said Findings, Conclusion and Order to Cease and Desist, and order said Commission to dismiss the complaint isued by it against your petitioners.

Dated: July 24, 1943

Donovan, Leisure, Newton & Lumbard,
By James R. Withrow, Jr.,
Partner,
Attorneys for the above-named Petitioners.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Marquette Cement Manufacturing Company, a corporation, *Petitioner,*
against
Federal Trade Commission, *Respondent.*
No. 8371.

PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL TRADE COMMISSION.

(U. S. C. C. A.—7. Filed Aug. 6, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes Marquette Cement Manufacturing Company, a corporation organized and existing under the laws of the State of Illinois (hereinafter sometimes referred to as "Marquette"), by its attorneys, and presents its petition to review and set aside Orders of the Federal Trade Commission (hereinafter referred to as the "Commission") entered on the 17th day of July, 1943, and served by mail upon Marquette on the 19th day of July, 1943. In support of its petition Marquette sets forth the following statements:

I. Nature of the Proceedings as to Which Review Is Sought.

1. In July, 1937, the Commission instituted proceedings (Docket No. 3167) against the Cement Institute, an unincorporated trade association, officers thereof, Marquette and numerous other corporations which were engaged in the manufacture and sale of portland cement in commerce and which (with a single exception) were at the time of the filing of the Commission's complaint members of the Cement Institute.

A. The Complaint.

Count I.

2. The complaint is in two counts. Count I charges that the respondents to the complaint for more than eight years preceding the filing of the complaint maintained and had in effect a combination among themselves to restrain competition in price and that this combination was made effective by agreement to employ, and by the actual employment of, certain methods and practices specified in Paragraphs Five to Seven of Count I.

3. It is alleged that the Institute is not engaged in commerce but that it is engaged in aiding cement Producers in carrying out the "unlawful methods" which "substantially affect competition among its members."

4. Paragraph Five of the complaint charges that the cement Producers (including Marquette), by agreement, "employed what is known as a Multiple Basing Point System of Pricing" and that "thereunder, all cement, wherever produced, is sold only at delivered prices"; that "under the said Multiple Basing Point System, for any destination of cement in the United States there is a governing basing point * * * each with its base price"; that under their combination or agreement the cement Producers by agreement use such basing points plus the all-rail rate of freight to their customer's destination in determining their delivered prices.

5. Paragraph Seven of Count I sets forth in further detail the alleged unlawful methods and practices which it is charged the cement Producers use under their combination or agreement. These charges are, in substance, as follows:

(a) That they have prepared and distributed among Producers books purporting to contain all-rail carload rates on cement from every "basing point" to all destinations; that these freight rate books, by agreement between the Producers, are used by the Producers "for quoting delivered prices"; that if any Producer deems any rate given in the Institute's freight rate books to be erroneous, the Producers have agreed "that each will use, in computing delivered price quotations, the rate given in the Institute's rate book, rather than the true railroad or Interstate Commerce Commission rate"; the Producers "understanding

that for price quotation purposes the Institute's freight rate schedules, right or wrong, are to be used."

(b) That, by agreement, they have prevented the use by their customers of trucks for the delivery of cement.

(c) That, by agreement, they have prevented their customers from diverting shipments of cement in transit, which has been the means of buyers obtaining concessions in delivered prices.

(d) That, by agreement, they have prevented the United States Government from securing f. o. b. mill prices on cement where by so doing the Government could have made savings in freight under Land Grant Acts of Congress.

(e) That they attempted, unsuccessfully, to obtain approval of NIRA Code provisions which would have required the division of customers into certain classes, but nevertheless made such classifications by agreement.

(f) That they have combined to limit their sales to middlemen falling under a certain agreed definition of a dealer.

(g) That they have agreed upon and used certain terms of sale.

(h) That, by agreement, they have attempted to restrict competition in certain seaboard centers by boycotting local dealers in such centers who have dealt in cement imported from foreign countries.

6. Based on these charges, Count I of the complaint concludes that this alleged combination and agreement by the Producers has "substantially * * * restrained competition in interstate commerce in cement", has "increased the price of cement to the buying public" and constitutes "unfair methods of competition" within the meaning of the Federal Trade Commission Act.

Count II.

7. Count II has a double aspect. Though it is entitled, "The Charge Under the Clayton Act," it appears first to repeat the charge of violation of the Federal Trade Commission Act made in Count I, by inclusion of the first five paragraphs of that Count. These paragraphs cover the charge of combination or conspiracy which, if proven, constitutes violation of the Sherman Act. Then, without allegations of additional facts, by means of interpretations and

a final argumentative conclusion, Count II charges discrimination in the "true price" or mill nets (the amounts remaining to the Producers after deduction of cost of delivering cement to the buyer's destination). The Commission in Count II urges that the prices charged and received by the Producers for delivered cement are not "actual prices", for the reason that such prices include the cost of transporting the delivered cement to destination where the buyer receives it. The Commission argues that "in order to derive the true price", whatever is "paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price", and since by this means it appears that the net amounts remaining to Producers, after deducting the charges of delivery to the different customers' destinations, vary from one another, it is concluded that these differing mill nets received by a Producer constitute discriminations in price which "have the effect substantially to lessen * * * competition in cement of like grade and quality; and constitute unlawful discrimination in price within the intent and meaning of Section 2 of the Clayton Act as amended by the Robinson-Patman Act."

8. As to the charge in the complaint that the Producers have by agreement used "what is known as a Multiple Basing Point System of Pricing", the complaint does not fully define the meaning and scope of the expression "what is known as a Multiple Basing Point System of Pricing", but the Commission has, in various official publications issued by it, substantially described the term as a method or system of pricing which involves agreed-upon, limited-in-number "basing points" and also agreed-upon so-called "basing point prices" that are to be used by the industry in determining prices, such as the Commission has charged and asserted have been used in the steel industry.

B. Marquette's Answer.

9. Marquette in its answer denies that it became a member of the Institute until in June, 1933, when it was constrained to join for the purpose of taking part in the formulation of a Code of Fair Competition for the industry under the National Industrial Recovery Act; that the Institute was then a body with only certain limited purposes and powers which did not affect Marquette's policies. It denies the agreement and combination charged in Count I, and

alleges that it has at all times been free to make any price for, and free to sell, cement in any manner it has chosen, and to the best of its information and belief every other Producer in its marketing area has been likewise free to so act and has so acted.

10. Marquette denies the existence of any arbitrarily determined, so-called "basing points", or the location thereof at any agreed-upon or fixed points, or the use thereof by any agreement, and alleges that "basing point" terminology has been inaccurately and erroneously used as referring to the cement industry and alleges that the destination price method which has generally prevailed in the industry is to be distinguished from so-called single and multiple "basing point systems" such as have prevailed in other industries.

11. As to the charges specified in Paragraph Seven of Count I, Marquette, in its answer, denies that it has ever made any use of the Institute's freight rate books for the purpose of arriving at any prices for cement, and alleges that for many years, antedating its membership in the Institute, it continuously maintained its own traffic department, and that it has made up its own freight rate books, from the official freight rates approved by the Interstate Commerce Commission, for the sole use of its own employees. Marquette's answer agrees with the statement in the complaint that freight rate schedules are matters of great complexity and that rates must be figured by experienced experts, such as it has employed. It alleges that it would be impractical and uneconomical for its customers to make use of the schedules published by railroads and freight rate bureaus.

12. Marquette denies the charge that it has thwarted or made any efforts to thwart the efforts of the United States government to secure f. o. b. mill prices and alleges that it has, to the best of its ability, cooperated with United States officials in obtaining maximum benefits of Land Grant rates and it has sold cement to the government on the f. o. b. mill basis.

13. Marquette denies that it has ever sold cement in any seaboard centers or that it has any knowledge of charges of boycotting of dealers in foreign cement at such centers, and in general it denies all the several charges of combination and conspiracy in Count I.

14. As to Count II, Marquette's answer denies that the

destination prices of cement are not the "actual prices" within the meaning of the Clayton Act, as amended by the Robinson-Patman Act, and denies that price discrimination can be determined and measured in the terms of the amount which the seller nets in different transactions, and in general denies all the allegations and conclusions contained in Count II.

C. Marquette's Motion to Recuse.

15. Prior to the testimony and evidence being considered by the Commission, briefs were required to be filed by the various Producers charged with having entered into the combination or conspiracy to restrain prices. Marquette in its brief asserted that the Commission, before it had considered the recorded evidence, the report of the examiner upon the evidence and the briefs and arguments in the case, had misapprehended and reached erroneous conclusions as to the actual marketing and pricing methods in the cement industry and particularly as to the marketing and pricing methods used by Marquette, and that the Commission, therefore, approached the disposition of the case with a prejudiced viewpoint, having pre-judged the issues, and in support of this assertion Marquette set forth excerpts from certain publications of the Commission, published both before and after the beginning of the proceedings in this case.

16. Before consideration of the recorded evidence, the Commission set a time for hearing the parties orally. Prior to Marquette's part in this oral proceeding, Marquette presented to the Commission a verified petition, motion and supporting affidavit to recuse the Commission from passing upon the issues. This petition charged, in substance: that the Commission is not a tribunal free from bias and prejudice, duly qualified to hear, try and pass upon the issues; that the Commission, prior to the consideration of the record and the evidence, had pre-judged the issues, as indicated by public and official utterances of the Commission and members thereof, some made and published prior to the filing of the complaint, others during the taking of the testimony in the proceedings, and others subsequent thereto; that such pre-judgment of the issues indicated prejudice and bias against the entire portland cement industry generally and particularly as to the meth-

ods of pricing, marketing and distributing portland cement by the various Producers, including Marquette; that, therefore, Marquette and the cement industry generally could not receive a fair, impartial hearing of the issues in the proceeding before the Commission as then constituted.

17. In support of this petition and motion, and for the purpose of showing the alleged prejudice and bias and the pre-judgment, Marquette presented with its petition and sought to put into evidence certain writings and publications of the Commisson and members thereof, running from the year 1927 to and including 1941 and contained in twenty-three separate exhibits. These exhibits contained statements made by the Commission and members thereof of numerous charges, conclusions, opinions, and innuendoes relating to the alleged use by the cement Producers generally, including Marquette, of certain methods of pricing and marketing cement which then were substantially the same as certain previously condemned and prohibited methods of pricing and marketing which the Commission asserted had been and were being used in the steel industry and which were referred to in terms of opprobrium such as "Pittsburgh Plus", "Basing Point System", "Multiple Basing Point System," "Price Fixing," etc. Such statements published before the Commission filed its Complaint were in substance that the marketing methods used in the cement industry were monopolistic, constituted "price fixing" and were contrary to the anti-trust laws of the United States and in particular contrary to the Sherman Act.

18. After the filing of this petition, the Commission on May 5, 1942, directed the Respondent Marquette to proceed and announced that it would consider all motions made by Marquette at the time it considered the case on the merits.

D. Final Orders of the Commission to Be Reviewed.

19. Thereafter, the Commission, on the 17th of July, 1934, issued several Orders which were served upon Marquette on July 19, 1943. These orders were in substance as follows:

"Order denying appeal from rulings of Trial Examiner on the admission into evidence of specified exhibits proffered by certain respondents."

"Order denying motion by certain respondents to set aside ruling of the Trial Examiner."

"Order denying motions to dismiss the complaint."

"Order denying motions to set aside rulings of the Trial Examiner, to strike exhibits and testimony from the record, to exclude certain respondents from the effect of certain evidence, and to dismiss the complaint in whole or in part as to certain respondents."

"Order denying petition and motion of respondent Marquette Cement Manufacturing Company to recuse the Federal Trade Commission." This order pertaining particularly to Marquette had reference to the petition and motion by which Marquette showed the bias and prejudice of the Commission as ground for members of the Commission to recuse themselves from further consideration of the issues in this case because of such bias and prejudice, and the petition of Marquette to introduce in evidence the documentary exhibits specified in such petition and which supported the motion and which were presented to the Commission with the aforesaid petition and motion for the purpose of being received in evidence. This order denies Marquette the right to put into evidence the various publications by which Marquette sought to show the bias and prejudice of the Commission. The said order recites that "'Among the grounds for the above order of denial are the following:

"All the published statements of the Commission which are relied upon by * * * Marquette * * * to support its petition to recuse, were made in due course of the Commission's official duties * * * as prescribed by Section 6 of the Act creating the Commission. The two principal statements which relate specifically to price competition in the cement industry were * * * printed, and given wide general circulation * * * before the complaint herein was issued * * *."

"Order", which consists of and is bound into a booklet containing one hundred thirty-four printed pages of findings of fact, conclusions, excerpts from testimony by question and answer, excerpts from certain exhibits and a conclusion that the alleged combination and acts and practices of the cement Producers named in the complaint constitute violations of the Federal Trade Commission Act and the alleged discriminations in price constitute violations of the Clayton Act, as amended by the Robinson-Patman Act, and an "Order to Cease and Desist", set out on six additional pages in the same booklet.

II. Facts and Statutes Upon Which Venue Is Based.

20. Marquette is a corporation organized and existing under the laws of the State of Illinois and resides and has its principal place of business in the State of Illinois, which is within the geographical jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

21. The statutes upon which venue is based are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid) and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid).

III. The Relief Prayed.

The petition of Marquette prays:

1. That a copy of this petition be forthwith served upon the Commission by the Clerk of this Court and that the said Commission be required forthwith to certify and file in this Court transcript of the entire record in the proceeding, including all the evidence taken and the Report and Order of the Commission and specifically including the Trial Examiner's Report Upon the Evidence and Marquette's Exceptions duly filed thereto by it with the Commission and copies of all petitions, motions, supporting affidavits and exhibits filed with the Commission and offered by Marquette in evidence, whether so received in evidence by the Commission or not;

2. That this Honorable Court review such entire record in this proceeding and that this Court set aside and vacate, as to Marquette, the aforesaid findings of fact and conclusions, and the several orders entered by the Commission in so far as they apply to Marquette, and that the Complaint issued by the Commission as to petitioner be directed by this Court to be dismissed by the Commission.

Dated at Chicago, Illinois, the 6th day of August, 1943.

Zimmerman and Norman,
By Edward Zimmerman,
Partner.
Attorneys for Marquette Cement Manufacturing Company.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit

Calaveras Cement Company, Pacific Portland Cement Company, Santa Cruz Portland Cement Company, Spokane Portland Cement Company, Yosemite Portland Cement Corporation, *Petitioners,*	8372.
vs.	
Federal Trade Commission, *Respondent.*	

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

U. S. C. C. A.-7 Filed Aug 10 1943 Kenneth J. Carrick, Clerk.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your petitioners (corporations duly organized in the respective states indicated), Calaveras Cement Company (Delaware), Pacific Portland Cement Company (California), Santa Cruz Portland Cement Company (California), Spokane Portland Cement Company (Washington), and Yosemite Portland Cement Corporation (Delaware), by their attorneys and jointly and severally present their petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on the 17th day of July, 1943, and in support thereof respectfully show:

I.

Nature of the Proceedings as to Which Review is Sought.

First: The order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute, an unincorporated trade association, its president and former sec-

retary, its officers and trustees, and seventy-five (75) corporations engaged in the manufacture or sale of Portland cement, all of whom are alleged to be members of The Cement Institute. Your petitioners comprise five (5) of the aforesaid Portland cement companies.

A. The Commission's Complaint.

Second: The Commission's complaint contains two counts, both founded upon the charge that petitioners and their co-respondents have maintained a nation-wide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing". In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Third: Count I of the complaint refers to "what is known as the multiple basing point system of pricing", and describes it as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further, that the alleged agreed use of this so-called "multiple basing point system" results in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

Fourth: Count I of the complaint also alleges that your petitioners and their co-respondents have agreed to use various enumerated practices and means in pursuance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: An agreement to determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates with the result that the official tariffs are allegedly nullified; an agreement to prevent the use by customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit, it being charged

that "diversions" result in concessions in delivered prices to the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to thwart the efforts of the United States Government to secure f.o.b. mill prices on cement; and the interpretation and formulation by the Cement Institute of official policies for the industry.

Fifth: Count I also sets out a number of specific effects which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: The maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

Sixth: Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing". It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged variations in such mill nets which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

B. Petitioners' Answers.

Seventh: Separate answers to the complaint were filed by each of your petitioners and by The Cement Institute and each of the other Portland cement companies (except for six related companies which submitted a joint answer) who were respondent below.

Eighth: Although petitioners' separate answers vary in their allegations and scope, they are the same in several fundamental respects, namely: They all deny the existence of the conspiracy which is charged; they all deny the existence of a "multiple basing point system", or any other system of pricing; they all deny that there is any agreement or understanding with respect to their various practices and marketing methods; they all deny the existence of any cooperative means allegedly adopted to support and implement the alleged combination; they all deny any influence of The Cement Institute upon the marketing or pricing policies and practices of its members; they all deny that they prepared or distributed among producers any freight rate information or books whatsoever, that freight rate information has ever been compiled or distributed by The Cement Institute for use in the States of Washington, Oregon, Idaho, Nevada, California, and Arizona, or any other of them, that they agreed to determine prices by using freight rates contained in freight rate books prepared by The Cement Institute or any other persons or organization, and that they determined prices by using freight rates contained in any such book or information; they all deny the existence of an artificial price level or excessive prices for cement; they all deny that their acts have hindered, lessened or restrained competition, and that they constitute an unfair method of competition; they all deny the alleged illegal discrimination in price; and they all deny each and all of the alleged effects of the combination and injury to competition and to the public.

Ninth: The individual answers of several of your petitioners contain affirmative defenses which describe and explain their respective practices and policies with respect to the sale and distribution of cement. Considered collectively for the purposes of this petition said affirmative defenses may be summarized as follows:

Tenth: (a) The answers state that petitioners sell cement largely at delivered prices, but they allege that delivered prices have not been used exclusively and they deny that f. o. b. mill prices have been unavailable; and they deny the use of the so-called multiple basing point system.

(b) Specific positions are taken by some of your petitioners in response to the allegations of the complaint that all the petitioners are engaged in interstate commerce. Thus, Beaver Portland Cement Company which has not engaged in business since October 1940 when its assets were sold to petitioner Pacific Portland Cement Company, alleges that it caused a small percentage of its total output to be shipped from its mill at Gold Hill, Oregon, into and through other states, Calaveras Cement Company denies that it is engaged in interstate commerce, except that in the regular course of its business it causes from time to time and upon the receipt of orders therefor, small quantities of cement to be shipped from its sole point of production at Kentucky House, Calaveras County, California, to southern Oregon and also to western Nevada; Pacific Portland Cement Company alleges that a comparatively small part of its business in cement was conducted outside California; Yosemite Portland Cement Corporation alleges that in the regular course of its business it from time to time causes cement to be shipped from Merced, California, the sole place of production, by it into Nevada and Oregon, but not elsewhere; Spokane Portland Cement Company, in addition to other defenses, asserts an affirmative defense wherein it alleges the dissolution of a former company having the same name and the incorporation of petitioner Spokane Portland Cement Company, a new company, in the year 1937, and that the acts alleged in the complaint, if committed, were committed by the old company and not by said petitioner.

Eleventh: The answers agree, as alleged in the complaint, that Portland cement is a standardized commodity with no brand able to command a higher price (even one cent higher) than another brand and that it is a heavy, bulky commodity in which transportation charges constitute a substantial part of the cost to the buyer.

Twelfth: Respecting Count II the answers deny the allegations thereof.

Thirteenth: All the answers reserve the right to move to dismiss the complaint for lack of jurisdiction.

C. Hearings and Argument Before the Commission.

Fourteenth: Beginning on December 1, 1937, evidence was taken before a Trial Examiner appointed by the Commission at various cities throughout the country, including Seattle, San Francisco and Los Angeles. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioners and their co-respondents was taken between September 5, 1939 and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940 and November 29, 1940, and on the latter date, the hearings were concluded.

Fifteenth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made individually on behalf of each of your petitioners and each of their co-respondents, at the close of the Commission's case in chief. The Commission denied these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, your petitioners and their co-respondents on January 27, 1941, filed a statement of Contentions and responded to a questionnaire submitted to them by the Trial Examiner, with respect to the facts proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioners and their co-respondents. After the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence were renewed. The Commission under date of July 17, 1943 denied each and every one of the aforementioned motions and exceptions.

D. The Order Sought to be Reviewed and Set Aside.

Sixteenth: On July 17, 1943, the Federal Trade Commission issued, and subsequently served upon petitioners, its Findings as to the facts and Conclusion and its Order to Cease and Desist entered thereon. A copy of said Findings, Conclusion and Order is annexed hereto and made a part hereof as Exhibit "A".

II.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

Seventeenth: The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid) and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid). Sec. 225, Title 28, U. S. Code, aforesaid, provides in paragraph (e):

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all

the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have jurisdiction of the proceeding and of the question determined therein, • • •"

Section 21 of Title 15, provides in part:

"• • • the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board.

• • • • •

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided."

B. The Facts as to Venue.

Eighteenth: By reason of the charge of conspiracy and combination, all of your petitioners and all of their co-respondents have allegedly maintained and used in this Circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute, of which your petitioners and their co-respondents are alleged to have been members, maintains in this Circuit, at Chicago, Illinois, its principal office and also a Freight Rate Bureau for compiling and publishing freight rate books allegedly employed in connection with the alleged unfair method of competition and discriminatory pricing method. Numerous acts, imputed to your petitioners and all of their co-

respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

III.

Prayer For Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray:

1. That a certified copy of this petition be forthwith served by the clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the findings as to the facts and conclusion and the order to cease and desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's report upon the evidence and the exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and their co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the exceptions filed thereto by and on behalf of petitioners and their co-respondents, the several motions made on behalf of petitioners and their co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate said Findings, Conclusion and Order

to Cease and Desist and order said Commission to dismiss the complaint issued by it against your petitioners.

Dated, August 4, 1943.

Chickering & Gregory,
Walter C. Fox, Jr.,
Counsel for Calaveras Cement Company.

Pillsbury, Madison & Sutro,
Marshall P. Madison,
Counsel for Pacific Portland Cement Company.

Morrison, Hohfeld, Foerster, Shuman & Clark,
Herbert W. Clark,
Counsel for Santa Cruz Portland Cement Company,

Witherspoon & Witherspoon,
A. W. Witherspoon,
Counsel for Spokane Portland Cement Company.

Earl & Hall & Gerdes,
Chaffee E. Hall,
Robert H. Gerdes,
Counsel for Yosemite Portland Cement Corporation.

(Exhibit A Follows.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8373

Huron Portland Cement Company,
Petitioner,

against

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL TRADE COMMISSION.

(U. S. C. C. A. 7. Filed Aug. 11, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Huron Portland Cement Company, one of the respondents in a certain complaint filed by and with the Federal Trade Commission, entitled In the Matter of the Cement Institute, et al., Docket No. 3167, files this, its petition for a review of the Orders and the Findings of Fact and Conclusion entered on the 17th day of July, 1943, by said Federal Trade Commission in said Matter and respectfully shows as follows:

I.

Nature of the Proceedings as to Which Review is Sought.

A. The Commission's Complaint. The Orders of the Federal Trade Commission which petitioner herein prays to be reviewed and set aside arose out of proceedings before the Commission begun by a complaint filed and issued by it on July 2, 1937, against your petitioner, a manufacturer and seller of Portland cement, and seventy-four other manufacturers and sellers of Portland cement, S. W. Storey, G. H. Reiter and The Cement Institute, an unincorporated association.

(a) The Commission's complaint contains two counts, both founded upon the charge that petitioner and its co-

respondents have maintained a nation-wide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

(b) Count I of the complaint refers to "what is known as the multiple basing point system of pricing," as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further that the alleged agreed use of this so-called "multiple basing point system" results in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

(c) Count I of the complaint also alleges that your petitioner and its co-respondents have agreed to use various enumerated practices and means in pursurance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: an agreement to determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates and with the result that the officials tariffs are allegedly nullified; an agreement to prevent the use by customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit; it being charged that "diversions" result in concessions in delivered prices to the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to thwart the efforts of the United States Government to secure f.o.b. mill prices on cement; and the interpretation and formulation by The Cement Institute of official policies for the industry.

(d) Count I also sets out a number of specific effects

which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: the maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

(e) Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing." It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged variations in such mill nets, which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

B. This petitioner's answer. This petitioner filed a separate answer to the complaint of the Commission. Its answer may be summarized as follows:

Answering Count I of the Complaint, it specifically denied that it had agreed or combined in any respect with the other respondents as charged in the complaint. It admitted the use at times of delivered prices in marketing its cement, but asserted that it also sold f.o.b. plant prices. It denied that the delivered price system as used in the industry was the result of any combination and denied that it had the effects charged.

As to the practices which the complaint alleged were cooperatively engaged in by respondents as the result or in pursuance of the alleged combination, petitioner asserted as to certain of them that it did not use them; as

to others that its use was not the result of any agreement or combination with other producers of cement.

In respect to Count II of the complaint, petitioner denied that the actual "price" of cement, as the word "price" is used in the Robinson-Patman Act is the net amount recovered by the seller at the point of shipment, asserting that the "price" is the amount paid by the buyer at destination. It denied any discrimination as charged.

C. Hearings, Motion and Argument before the Commission. The said Matter came on to be heard before the Examiner of the Federal Trade Commission and proofs were there taken. At the conclusion of the Commission's case, this petitioner moved the Commission to dismiss Count I of the complaint as to this petitioner on the ground that the proofs did not support the charges against it. This motion was duly heard by the Comsion on briefs and oral argument and was thereafter denied by it. Thereafter the Trial Examiner made a report on the evidence and again thereafter this petitioner filed exceptions to said report. Thereafter this petitioner filed its separate brief with the Commission in opposition to the said complaint. Again thereafter the Matter came on for final hearing and argument before the Commission on said complaint, the answers thereto, the evidence taken before the Commission, the proceedings before the Commission, the report of the Trial Examiner and the exceptions thereto, the briefs in support of the complaint and in opposition thereto and the oral arguments of counsel, including counsel for this petitioner. The Commission thereafter and on the 17th day of July, 1943 made its Findings as to the Facts and Conclusion and entered an Order thereon.

D. The Order, the Findings as to the Facts and Conclusion sought to be reviewed. A copy of the final Order herein prayed to be reviewed is attached hereto as Exhibit A.

Inasmuch as other respondents in said Matter have heretofore filed in this court petitions to review the said Order and the said Findings as to the Facts and Conclusion and have incorporated therein a copy of said Findings as to the Facts and Conclusion and because said Findings are particularly voluminous and extensive, pe-

titioner prays that reference may be made thereto and that it be excused from repeating same herein.

II.

The Facts Upon Which the Venue is Based.

A. The Facts. This petitioner shows that it is, and was at the time of the acts charged in the complaint, a Michigan corporation engaged in business in the states of Illinois, Indiana and Wisconsin and in the Seventh Judicial Circuit. Two of its plants are located in the cities of Milwaukee and Manitowoc, Wisconsin, within said Seventh Judicial Circuit. Certain of the acts and practices alleged in said complaint and referred to in said Findings and Order were, in part and to a certain extent, used within said Seventh Judicial Circuit.

B. The Statutes upon which the venue is based. The statutes under which this court has jurisdiction and venue are:

Section 225, Title 28 U. S. Code (Section 128 of the Judicial Code, as amended).

Section 45, Title 15 U. S. Code (Section 5 of the Federal Trade Commission Act).

Section 21, Title 15 U. S. Code (Section 11 of the Clayton Act).

Wherefore, believing that the aforesaid Orders and Findings as to the Facts and Conclusion of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioner, Huron Portland Cement Company, prays:

1. That a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken, the motion to dismiss made by this petitioner and the Order in respect thereto, and the Order and the Findings as to the Facts and the Conclusion of the Commission.

2. That the Federal Trade Commission be required to certify and file in this court the Trial Examiner's Report Upon the Evidence and the Exceptions duly filed thereto by and on behalf of petitioner and its co-respondents.

3. That this court review the entire record in this proceeding including all the evidence taken, the several objections and exceptions made on behalf of petitioner and its co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's Report Upon the Evidence, the Exceptions filed thereto by and on behalf of petitioner and its co-respondents, the motion to dismiss made by petitioner and the ruling and Order thereon by the Commission, the Order to Cease and Desist of the Commission and its Findings of Fact and Conclusions of Law, and set aside and vacate said Findings and Conclusion and said Order to Cease and Desist, and said ruling and Order on petitioner's motion to dismiss and direct and order said Commission to dismiss the said complaint issued by it against your petitioner.

Huron Portland Cement Company,
By Hal H. Smith,
Its Attorney.
Address: 11th Floor Ford Bldg.,
Detroit 26, Michigan.

Dated: August 10th, 1943.

No. 8386.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Superior Portland Cement, Inc.,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Aug. 23, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Comes now your petitioner, Superior Portland Cement, Inc., a corporation duly organized in the State of Washington, with its principal place of business in Seattle,

Washington, by its attorneys, and presents its petition to review and set aside the order of the Federal Trade Commission, hereinafter referred to as the "Commission," made and entered on the 17th day of July, 1943, and in support thereof respectfully shows:

I.

Nature of the Proceedings as to Which Review is Sought.

First: The order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute, an unincorporated trade association, its president and former secretary, its officers and trustees, and seventy-five (75) corporations engaged in the manufacture or sale of Portland cement, all of whom are alleged to be members of The Cement Institute. Your petitioner is one of the aforesaid Portland cement companies.

A. The Commission's Complaint.

Second: The Commission's complaint contains two counts, both founded upon the charge that petitioner and its co-respondents have maintained a nation-wide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Third: Count I of the complaint refers to "what is known as the multiple basing point system of pricing," and describes it as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further that the alleged agreed use of this so-called "multiple basing point system" results in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

Fourth: Count I of the complaint also alleges that your petitioner and its co-respondents have agreed to use various enumerated practices and means in pursuance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: An agreement to determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates with the result that the official tariffs are allegedly nullified; an agreement to prevent the use of customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit, it being charged that "diversions" result in concessions in delivered prices by the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to thwart the efforts of the United States Government to secure f.o.b. mill prices on cement; and the interpretation and formulation by The Cement Institute of official policies for the industry.

Fifth: Count I also sets out a number of specific effects which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: The maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

Sixth: Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing." It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged

variations in such mill nets which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Seventh: The complaint alleges generally that petitioner and its co-respondents in the regular course of their business in the sale and distribution of cement caused the same to be shipped and transported from the various points of its production in certain respective states through and into other states of the United States.

B. Petitioner's Answer.

Eighth: A separate answer to the complaint was filed by your petitioner. Petitioner denied that in the regular course of its business in the sale and distribution of cement it caused the same to be shipped and transported from the point of its production into other states of the United States and further denied generally that your petitioner is engaged in interstate commerce. The answer alleged that the Federal Trade Commission had no jurisdiction over petitioner, and reserved the right to move to dismiss the complaint.

Ninth: Subject to this reservation petitioner further answered the complaint by denying the existence of the conspiracy which is charged; denying that it employed the so-called "multiple basing point system" of pricing; denying that it has at any time maintained any combination, agreement or understanding with its co-respondents concerning marketing methods; denying the existence of any and participation by it in any cooperative means allegedly adopted to support and implement the alleged combination; denying any influence of The Cement Institute upon the marketing or pricing policies and practices of petitioner; denying that any freight rate information has ever been compiled or distributed for the State of Washington; and denying, for lack of knowledge, that such information had been compiled elsewhere; denying that it ever agreed to use rates other than true railroad rates; denying the existence of an artificial price level or excessive prices for cement; denying that it sells only on delivered prices and denying that it has thwarted efforts of government officials to secure f.o.b. mill prices, but on the contrary, specifically alleging that it does bid f.o.b. mill on government orders;

denying that it has ever arbitrarily and cooperatively divided its customers into certain classifications; denying that it ever threatened to boycott or boycotted imported cement; denying that it has ever entered into any agreement or understanding to eliminate diversions in transit; denying that it agreed to prevent the use by customers of trucks for delivery of cement; denying that its acts have hindered, lessened or restrained competition; denying that its acts constitute an unfair method of competition, and denying each and all of the alleged effects of the combination and injury to competition and to the public.

Tenth: Respecting Count II, the answer denies that petitioner has ever discriminated in price between customers and alleges that any difference in prices which have been made were made in good faith for the purpose of meeting competition or for other purposes in compliance with the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

C. Hearings and Argument Before the Commission.

Eleventh: Beginning on December 1, 1937, evidence was taken before a Trial Examiner appointed by the Commission at various cities throughout the country, including Seattle, San Francisco, and Los Angeles. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioner and its co-respondents was taken between September 5, 1939, and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940, and November 29, 1940, and on the latter date, the hearings were concluded.

Twelfth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made on behalf of petitioner at the close of the Commission's case in chief. The Commission denied these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, your petitioner on January 27, 1941, filed a statement of Contentions and responded to a questionnaire submitted to it by the Trial Examiner, with respect to the fact proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioner. After

the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence were renewed. The Commission under date of July 17, 1943, denied each and every one of the aforementioned motions and exceptions.

D. The Order Sought to be Reviewed and Set Aside.

Thirteenth: On July 17, 1943, the Federal Trade Commission issued and subsequently served upon petitioner its Findings as to the Facts and Conclusions and its Order to Cease and Desist entered thereon. A copy of said order is annexed hereto and made a part hereof as Exhibit "A". A copy of the Findings as to the Facts and Conclusions is set forth as Exhibit "A" to the petition of Aetna Portland Cement Company, et al., to review and set aside the same order of the Federal Trade Commission, filed in this Court on July 26, 1943, and by reference said Findings and Conclusion are specifically made a part as if set forth herein.

II.

Facts and Statutes Upon Which Jurisdiction and Venue Are Based.

A. The Statutes.

Fourteenth: The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid), and Sec. 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid).

B. The Facts as to Venue.

Fifteenth: By reason of the charge of conspiracy and combination, your petitioner and all of its co-respondents have allegedly maintained and used in this Circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute, of which your petitioner and its co-respondents are alleged to have been members,

maintains in this Circuit at Chicago, Illinois, its principal office. Numerous acts, imputed to your petitioner and all of its co-respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioner prays:

1. That a certified copy of this petition be forthwith served by the clerk of this Court upon the Federal Trade Commission, and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the findings as to the facts and conclusion and the order to cease and desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's report upon the evidence and the exceptions duly filed thereto by and on behalf of petitioner and its co-respondents.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioner and its co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the exceptions filed thereto by and on behalf of petitioner and its co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss the complaint issued by it against your petitioner.

Dated August 16, 1943.

Little, Leader, LeSourd & Palmer,
By F. A. LeSourd,
Partner,
Counsel for Petitioner, Superior Portland Cement, Inc.

No. 8389.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Northwestern Portland Cement Company,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(U. S. C. C. A.—7. Filed Aug. 26, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes your petitioner, Northwestern Portland Cement Company, a corporation duly organized in and under the laws of the State of Washington, by its attorneys, Weter, Roberts & Shefelman and S. Harold Shefelman, and presents its petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on the 17th day of July, 1943, and in support thereof respectfully shows:

I.

Nature of the Proceedings as to Which Review Is Sought.

First: The order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute, an unincorporated trade association, its president and former secretary, its officers and trustees, and seventy-five (75) corporations engaged in the manufacture or sale of Portland cement, all of whom are alleged to be members of The Cement Institute. Your petitioner is one of the aforesaid Portland cement companies.

A. The Commission's Complaint.

Second: The Commission's complaint contains two counts, both founded upon the charge that petitioner and its co-respondents have maintained a nationwide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Third: Count I of the complaint refers to "what is known as the multiple basing point system of pricing," and describes it as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States, and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further that the alleged agreed use of this so-called "multiple basing point system" resulted in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

Fourth: Count I of the complaint also alleges that your petitioner and its co-respondents have agreed to use various enumerated practices and means in pursuance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: An agreement to determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates, with the result that the official tariffs are allegedly nullified; an agreement to prevent the use by customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit, it being charged that "diversions" result in concessions in delivered prices to the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to thwart the efforts of the United States Government to secure f.o.b. mill prices on cement;

and the interpretation and formulation by The Cement Institute of official policies for the industry.

Fifth: Count I also sets out a number of specific effects which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: The maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

Sixth: Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing." It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged variations in such mill nets which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

B. Petitioner's Answer.

Seventh: Separate answers to the complaint were filed by your petitioner and by The Cement Institute and each of the other Portland Cement companies (except for six related companies which submitted a joint answer), who were respondents below.

Eighth: Petitioner's answer denies that it is in any manner engaged in interstate commerce, or makes any shipment therein, or causes cement to be shipped or transported into or through any of the states of the United States, or any place except the State of Washington, or that it competes outside the geographical limits of said

state. (The Commission finds in Paragraph Two, on page 16 of its Findings as to the Facts, "that Northwestern Portland makes no sales or shipments outside the State of Washington.") Petitioner's answer further denies that its competition has been hindered, lessened, restricted, or restrained, as alleged in the complaint, or in any other manner.

Ninth: Petitioner's answer further denies the existence of the conspiracy which is charged; it denies the existence of a "multiple basing point system," or any other system of pricing; it denies that it sells cement only at delivered prices or that it has at any time thwarted the efforts of government officials to secure f.o.b. mill prices on cement; it denies that it has refused to quote f.o.b. mill prices to the federal government, and specifically avers that it has actually quoted such prices; it denies that it has prevented the use by customers of trucks for delivery; it denies that it has taken any measure to eliminate diversions of cement in transit; it denies that it has threatened to boycott or boycotted any dealer customers who traded in imported cement; it denies that there is any agreement or understanding with respect to the various practices and marketing methods carried on by petitioner and its co-respondents; it denies the existence of any cooperative means allegedly adopted to support and implement the alleged combination; it denies any influence of The Cement Institute upon the marketing or pricing of policies and practices of its members; it denies that it prepared or distributed among producers, or received from them, any freight rate information or books whatsoever, that freight rate information has ever been compiled or distributed by The Cement Institute for use in the State of Washington, that it agreed to determine prices by using freight rates contained in freight rate books prepared by The Cement Institute or any other person or organization, or that it determined prices by using freight rates contained in any such book or information; it denies the existence of an artificial price level or excessive prices for cement; it denies that its acts have hindered, lessened or restrained competition, and that they constitute an unfair method of competition; it denies the alleged illegal discrimination in price; and it denies each and all of the alleged effects of the combination and any injury to competition and to the public.

Tenth: The answer agrees, as alleged in the complaint,

that Portland cement is a standardized commodity with no brand able to command a higher price (even one cent higher) than another brand, and that it is a heavy, bulky commodity in which transportation charges constitute a substantial part of the cost to the buyer.

Eleventh: Respecting Count II, the answer denies the allegations thereof.

Twelfth: As a separate and affirmative defense to Count II, petitioner's answer states that any differences in price which may have been made by it have been made in good faith to meet competition, or otherwise, pursuant to Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Thirteenth: The answer reserves the right to move to dismiss the complaint for lack of jurisdiction.

C. Hearings and Arguments Before the Commission.

Fourteenth: Beginning on December 1, 1937, evidence was taken before a Trial Examiner appointed by the Commission at various cities throughout the country, including Seattle. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioner and its co-respondents was taken between September 5, 1939, and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940, and November 29, 1940, and on the latter date the hearings were concluded.

Fifteenth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made individually on behalf of your petitioner and each of its co-respondents at the close of the Commission's case in chief. The Commission denied these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed, and pursuant to the request of the Trial Examiner, your petitioner and its co-respondents, on or about January 27, 1941, filed a statement of contentions and responded to a questionnaire submitted to them by the Trial Examiner with respect to the facts proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioner and its co-respondents.

After the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motion regarding the conduct of the hearings and rulings on the reception and rejection of evidence were renewed. The Commission, under date of July 17, 1943, denied each and every one of the aforementioned motions and exceptions.

D. The Order Sought to be Reviewed and Set Aside.

Sixteenth: On July 17, 1943, the Federal Trade Commission issued, and subsequently served upon petitioner, its Findings as to the Facts, its Conclusion and its Order to Cease and Desist entered thereon. A copy of the Order is attached hereto and made a part hereof as "Exhibit A." A copy of the Findings as to the Facts and Conclusion is already before this Court as a part of the Petition filed on behalf of Aetna Portland Cement Company, et al.

II.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

Seventeenth: The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid), and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid). Sec. 225, Title 28, U. S. Code aforesaid, provides in paragraph (c):

"The Circuit Court of Appeals are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15 provides in paragraph (c) in part:

"Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used

or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have jurisdiction of the proceeding and of the question determined therein, * * *."

Section 21 of Title 15 provides in part:

"* * * the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority or board.

* * * * * *

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided."

B. The Facts as to Venue.

Eighteenth: By reason of the charge of conspiracy and combination, your petitioner and all of its co-respondents have allegedly maintained and used in this circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute; of which your petitioner and its co-respondents are alleged to have been members, maintains its principal office in this Circuit, at Chicago, Illinois. Numerous acts, imputed to your petitioner and

all of its co-respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioner prays:

1. That a certified copy of this petition be forthwith served by the clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, including all of the evidence taken and the Findings as to the Facts and Conclusions and the Order to Cease and Desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's report upon the evidence and the exceptions duly filed thereby and on behalf of petitioner and its co-respondents.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioner and its co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the Exceptions filed thereto by and on behalf of petitioner and its co-respondents, the several motions made on behalf of petitioner and its co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss the complaint issued by it against your petitioner.

Dated August 16, 1943.

Weter, Roberts & Shefelman,
S. Harold Shefelman,
Counsel for Northwestern Portland Cement Company.

1612 Northern Life Tower,
Seattle, Washington.

No. 8393.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Riverside Cement Co., a corporation,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

U. S. C. C. A.—7 Filed Sep 1-1943 Kenneth J. Carrick, Clerk.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Riverside Cement Co., a corporation, organized and existing under the laws of the State of Delaware (and hereinafter sometimes referred to as "Riverside"), by its attorneys, hereby presents its petition to review and to set aside that certain order of the Federal Trade Commission made and entered on July 17, 1943, a copy of which said order is hereto annexed, marked "Exhibit A" and made a part hereof, and in support of its said petition respectfully shows and alleges:

I.

Nature of the Proceedings as to Which Review Is Sought.

1. On July 2, 1937, respondent (hereinafter referred to as the "Commission") filed and issued its complaint, in two counts, against the Cement Institute, an unincorporated trade association, the officers and trustees thereof, and seventy-five corporations, including petitioner, engaged in the business of commercially manufacturing and selling cement. The proceeding instituted by the filing of said complaint bore Docket No. 3167, and culminated in the order herein prayed to be reviewed and set aside.

A. The Commission's Complaint.

2. Count I of the complaint charges that respondents named therein have for eight years last past maintained a combination to restrain competition in cement prices through the mutual agreement to employ, and the cooperative employment of, a multiple basing point system of delivered prices. It is alleged that such prices are determined, with reference to some sixty governing basing points throughout the United States, by the use of the factors of governing base price plus all-rail freight to destination, resulting, it is charged, in the quoting of identical delivered prices at any given destination in the United States. It is then alleged that in support of such combination respondents have used and followed certain means and practices such as (a) the use of freight rate books furnished by the Cement Institute, irrespective of variations between the rates specified therein and those set forth in published tariffs; (b) concerted and cooperative efforts to restrict or forbid sales to customer's trucks at mill; (c) cooperative measures to eliminate diversions in transit; (d) refusal to bid F. O. B. mill to the Government and use of a so-called "control clause" to deprive the Government of the use of land grant freight rates where available; (e) arbitrary and cooperative classification of customers; (f) use of an agreed and arbitrary definition of a "cement dealer"; (g) mutual understanding and concert resulting in uniform terms of sale and discount; (h) discrimination against foreign cement; (i) the formulation and interpretation by the Cement Institute of industry policies. After setting forth certain results assertedly flowing from the alleged combination, the count concludes by charging that the alleged combination has substantially restrained competition and that the acts and practices complained of constitute unfair methods of competition within the meaning of the Federal Trade Commission Act.

3. Count II incorporates and realleges, inter alia, the paragraphs (Four and Five) of the first count charging the combination with reference to the use of a multiple basing point system and the utilization of the means and practices in support thereof detailed above. The count then alleges that delivered prices under the multiple basing point system are not true prices, because of the element of

cost of transportation; that the true price is the amount received by the seller at the mill after deduction of such transportation cost; that sales by producing respondents not located at basing points and sales by producing respondent located at basing points to customers outside the territory governed by such basing points are made at "almost as many true prices as there are customers' locations." It is then charged that an unlawful discrimination in price among customers thus results, within the meaning of section 2 of the Clayton Act as amended by the Robinson-Patman Act and that such discrimination likewise results from the combination and conspiracy alleged; and that such discrimination substantially lessens competition in cement of like grade and quality.

B. Riverside's Answer.

4. Answering Count I, Riverside denied that it was, or ever had been, a party to the combination charged and alleged that it was without knowledge as to the existence of any such combination; it alleged that it did not use the multiple basing point system of pricing, and that this fact was well known to the Commission; in this connection it referred to the Commission's Report to Congress (1933, 73rd Congress, 1st Session, Senate Document No. 71, pp. 37, 115, 127) where the Commission expressly found and declared that the multiple basing point method of pricing had been abandoned in California not later than 1929; it denied that it had employed any methods or practices whatever in support of any combination; it alleged that it had never used the Cement Institute freight rate books and that no such books had ever been prepared for the area in which it markets cement, namely, Southern California, Arizona and Nevada; it alleged that it had long been its practice to deliver cement to customers' trucks at mill at an F. O. B. mill price or its equivalent, and referred to Senate Document No. 71, p. 117, in this connection; it denied that it had taken any measures to prevent diversions in transit; it denied that it had ever employed any "control clause" and alleged that it had long been its fixed policy to sell to governmental agencies at F. O. B. mill prices, or their equivalent, when desired by such agencies, in order that the latter might have the advantage of any favorable freight rates, and it referred to Senate Docu-

ment No. 71, p. 68 et seq. (Boulder Dam bids) in this regard; it denied that it had participated in any arbitrary or cooperative classification of customers or in the use of any agreed or arbitrary definition of a "cement dealer"; it denied its participation in any mutual understanding or concert or in any such resulting in uniform terms of sale and discount; it denied any discrimination on its part against foreign cement; and it denied that the Cement Institute formulated its policies or any policies of the industry so far as its knowledge was concerned.

5. Answering Count II, in addition to reiterating the foregoing matters by incorporation, Riverside denied that any discrimination whatever had resulted from any act or practice on its part, or so far as it had knowledge, on the part of any other respondent; and likewise denied that it had committed or carried on any such acts of discrimination as charged.

6. In addition to the foregoing, Riverside's answer reserved the right to move to dismiss the proceeding as against it.

C. Hearings, Motion to Dismiss and Argument Before the Commission.

7. Hearings on the issues joined by the complaint and the answer of the several respondents commenced before a Trial Examiner of the Commission on December 1, 1937, and, with adjournments over from time to time, were concluded on November 28, 1940. Motions to dismiss the complaint and to strike and limit specified evidence were made by Riverside at the close of the Commission's case in chief and were denied without prejudice to their renewal. In May of 1941 the Trial Examiner filed his Report upon the Evidence, to which Riverside duly excepted. The matter was then briefed and, in April and May, 1942, argued before the Commission. The motions above mentioned were renewed and duly denied on July 17, 1943.

8. On said date of July 17, 1943, the Commission rendered and subsequently served upon Riverside its Findings as to the fact and Conclusions, and its Order to Cease and Desist (Exhibit A hereto).

II.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

9. This Court has jurisdiction and venue under the following statutes: 28 U. S. C. § 225 (section 128 of Judicial Code as amended), 15 U. S. C. § 45 (section 5 of the Federal Trade Commission Act as amended), 15 U. S. C. § 21 (section 11 of the Clayton Act as amended). 28 U. S. C. § 225 empowers the Circuit Courts of Appeals to enforce, set aside or modify orders of the Federal Trade Commission as provided in 15 U. S. C. § 45. The latter section provides for a review on petition by any person, firm or corporation required by order of the Commission to cease and desist from using any method of competition or act or practice in the Circuit Court of Appeals "within any circuit where the method of competition or act or practice in question was used" within sixty days from the date of service of such order. 15 U. S. C. § 21 contains substantially similar provisions with reference to cease and desist orders issued under the Clayton Act as amended, except that no time limitation is prescribed.

B. The Facts as to Venue.

10. By reason of the charge of conspiracy and combination, Riverside and all other respondents have allegedly maintained and used in this Circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute, of which Riverside and other respondents are alleged to have been members, maintains in this Circuit, at Chicago, Illinois, its principal office and also a Freight Rate Bureau for compiling and publishing freight rate books allegedly employed in connection with the alleged unfair method of competition and discriminatory pricing method charged. Numerous acts, imputed by the Commission's findings to Riverside and all other respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, petitioner Riverside prays:

1. That a certified copy of this petition be forthwith served by the clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, including all of the evidence taken and the findings as to the facts and conclusion and the order to cease and desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's report upon the evidence and the exceptions duly filed thereto by and on behalf of this petitioner.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of this petitioner in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the exceptions filed thereto by and on behalf of this petitioner, the several motions made on behalf of this petitioner before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate, as to this petitioner, said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss, as to this petitioner, the complaint heretofore issued in the aforesaid proceeding.

Dated: August 27, 1943.

Louis W. Myers,
Pierce Works,
By Pierce Works,
Attorneys for Petitioner Riverside Cement Co.

O'Melveny & Myers,
Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8399

Universal Atlas Cement Company,
A Corporation,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(U. S. C. C. A.-7. Filed Sept. 7, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, Universal Atlas Cement Company, a corporation, respectfully represents that:

1. Petitioner is a corporation organized, existing and doing business under the laws of the State of Indiana. Petitioner's principal office and place of business is at 135 East 42nd Street, New York, N. Y. and it has an office and place of business at 208 South La Salle Street, Chicago, Illinois. Petitioner carries on business within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

2. A. On to-wit, the 2nd day of July, 1937, the Federal Trade Commission filed and issued its complaint in two counts against petitioner and numerous other respondents. Count I of the complaint alleged that this petitioner and others have combined to restrain competition in price by mutual understanding or agreement to employ and by the cooperative employment of a "multiple basing point system of pricing" under which all cement is sold only at delivered prices; that each respondent to said complaint charges at any given destination in the United States a delivered price derived by the use of a formula, to-wit, the prevailing base price at the governing

basing point, plus all-rail freight from said governing basing point to the destination in question, and that the result is identical delivered prices from all respondents selling at any given destination. The complaint further alleged that the governing basing point for any destination is that basing point whose base price, plus freight to the destination in question, makes a lower sum than the base price, plus freight to the destination in question, from any other basing point. The complaint further alleged the cooperative employment by agreement among respondents of many other practices in support of the alleged combination to restrain competition in price, such for example, as:

(1) The use by all respondents of freight rate books prepared by The Cement Institute for the purposes of arriving at uniform destination prices.

(2) The refusal to allow cement buyers to buy at the mill and make deliveries in trucks.

(3) The refusal to allow cement buyers to divert shipments in transit from one destination to another.

(4) The refusal to quote the Federal Government on an f.o.b. mill basis.

(5) Classification of customers who can buy direct from cement manufacturers and customers who cannot buy direct.

(6) Agreed definitions of cement dealers to whom cement will be sold by manufacturers.

(7) Uniform terms of sale and discounts as the result of mutual understanding and concert of action.

(8) Combined action by certain respondents in combating competition from foreign cement.

(9) Formulation of policies for the cement industry by The Cement Institute.

(10) False advertising in an attempt to persuade the public that the method of selling cement generally in use by respondents was competitive.

The complaint charged that the alleged acts and practices constituted unfair methods of competition in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create the Federal Trade Commission, define its powers and duties and for other purposes."

B. Count II of the complaint of the Federal Trade Commission alleged that delivered prices for cement made

by respondents are not the actual prices thereof but that, in order to derive the true price received for such cement, the transportation of the cement to destination must be deducted from the delivered price. The complaint further alleged that after making such deduction of freight from the delivered price, the balance remaining is not the same on all sales by any respondent to varying destinations and that, by reason thereof, each of said respondent manufacturers of cement, in making sales thereof, is constantly discriminating in price in violation of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act.

3. Thereafter petitioner filed its answer to said complaint, denying that it had participated in any restraint of competition or that it had combined to restrain competition in price or otherwise, and denying understanding or agreement or combination to sell at any agreed price or in any particular manner, although admitting that cement is generally sold at destination prices. The answer of petitioner further denied that destination prices are not true prices within the meaning of the Robinson-Patman Act and denied any price discrimination. The answer of petitioner further affirmatively pleaded that any differences in price made by it have been made in good faith to meet competition pursuant to law. The answer further denied that the methods of petitioner in marketing its cement injure any competitor or the business of any competitor.

4. Extensive hearings were had before a Trial Examiner of the Federal Trade Commission and after the close of said hearings a report of the Trial Examiner was made in writing, briefs were filed on behalf of the Commission and various respondents, including this petitioner, and oral arguments were had before the Federal Trade Commission. The Federal Trade Commission, on or about the 17th day of July, 1943, made its Findings as to the Facts and Conclusion and issued and served upon petitioner a Cease and Desist Order, a copy of which Cease and Desist Order is hereto attached marked Exhibit "A."

5. Petitioner, being aggrieved by the making of said

Findings as to the Facts, Conclusion and said Cease and Desist Order, desires to obtain a review thereof by this Honorable Court and files this petition under Section 5 (c) of said Federal Trade Commission Act (15 USCA 45) and under Section 11 of said Clayton Act (15 USCA 21), as amended.

Wherefore, petitioner prays this Honorable Court to review said Findings as to the Facts, Conclusion and Cease and Desist Order, and reverse and set aside the same.

UNIVERSAL ATLAS CEMENT COMPANY,
a corporation, *Petitioner*
By .....
.....
.....
.....
Its Attorneys.

No. 8402.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

California Portland Cement Company,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE COMMISSION.

(U. S. C. C. A.-7. Filed Sep. 8, 1943. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Petitioner California Portland Cement Company, a corporation duly organized under the laws of the State of California, by its attorneys, presents its petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission") made and

entered on July 17, 1943, and in support of its petition respectfully shows as follows:

I.

Nature of Proceedings as to Which Review Is Sought.

1. The order of the Commission to which this petition is directed was issued in proceedings which were instituted by a complaint filed and issued by the Commission on July 2, 1937, against The Cement Institute, an unincorporated trade association, the officers and trustees thereof, and some seventy-five corporations engaged in manufacturing and selling Portland cement. Petitioner is one of the said Portland cement companies.

A. The Complaint.

2. The Commission's complaint contains two counts. Count I alleges that the respondents named therein maintained and had in effect a combination among themselves to restrain competition in price by a mutual understanding or agreement to employ, and by the actual employment of, what is called in the complaint a "multiple basing point system" of pricing cement under which, it is alleged, there are in the United States some sixty basing points and each producer quotes and charges prices derived by the use of a formula which is: the prevailing base price at the governing basing point plus the all rail rate of freight from said governing basing point to the location of the customer. It is then alleged that in pursuance and in support of the alleged combination to employ the "multiple basing point system" respondents by mutual understanding or agreement with the other respondents employed certain "methods for making the system (multiple basing point system) effective." The alleged methods employed to make the "multiple basing point system" effective are set forth in the complaint and include the following: (a) the distribution among the cement producers of freight rate books and the use of the freight rates quoted in the books in fixing the freight rate item of the alleged "multiple basing point system" formula, (b) a restriction of delivery of cement by truck, (c) a restriction on purchasers' privileges to divert shipments of cement in tran-

sit, (d) withholding from the Government the opportunity to buy cement at f.o.b. mill prices, (e) adopting uniform classifications of cement buyers who are permitted to buy direct from the manufacturers, (f) adopting an arbitrary definition of a "cement dealer" who may buy cement direct from the manufacturers, (g) adopting uniform terms of sale and discounts, (h) adopting cooperative practices to restrict the sale of foreign cement, (i) fixing marketing practices in accordance with practices formulated by or through The Cement Institute, (j) advertising to affect the conception and opinion of the public respecting the "multiple basing point system." The complaint then alleges that the effect of the adoption and maintenance of the "multiple basing point system" has been to restrain competition in price and to cause injury to the public in particulars set forth in the complaint.

3. Count II realleges that the respondents maintained and had in effect a combination among themselves to restrain competition in price which was made effective by a mutual understanding or agreement to employ and by the actual employment of the said "multiple basing point system." It is then alleged that the delivered prices made under the "multiple basing point system" formula are not the true prices, that in order to derive the true prices the amount actually paid to the carrier for transportation must be deducted from the delivered prices, and that the sale of cement at prices fixed by the "multiple basing point system" formula resulted in discriminations in price within the meaning of the Clayton Act as amended by the Robinson-Patman Act. It is alleged that the discriminations in price have been in substantial amounts and have been made with the purpose to prevent, lessen and destroy competition in price in interstate commerce between this respondent and all other producing respondents. It is alleged that the discrimination in price is the result of the alleged combination and conspiracy and that the effect thereof is to injure, destroy and prevent competition in price between this respondent and the other producing respondents.

B. The Answer of California Portland Cement Company.

4. California Portland Cement Company filed its separate answer to the complaint. Answering Count I it alleged that its interstate commerce amounted to less than three per cent of its total commerce and alleged that it was in competition with other respondents which market cement in the geographical areas in which it markets cement but that it has not been in competition with other producing respondents. It denied that it was or ever had been a party to the combination alleged in the complaint and alleged that it did not have knowledge of the existence of any such combination. It alleged that it did not cooperatively or otherwise employ the "multiple basing point system" of pricing and that it did not use the "multiple basing point system" formula in fixing its prices. It denied that it had any mutual understanding or agreement to employ the said system or formula. It denied that it employed any methods or practices or was a party to any understanding or agreement to employ any methods or practices to make the combination effective. It denied that it used or participated in any distribution or use of the freight rate books referred to in the complaint, that it imposed restrictions on the delivery of cement by truck, that it imposed any restrictions on purchasers' privileges to divert shipments of cement in transit, that it withheld from the Government any opportunity to buy cement at f.o.b. mill prices, that it adopted any uniform classifications of cement buyers who are permitted to buy direct from the manufacturers, that it adopted any arbitrary definition or any generally used definition of a "cement dealer" who may buy cement direct from the manufacturers, that it adopted uniform terms of sale and discounts, that it participated in cooperative practices to restrict the sale of foreign cement, that its marketing practices were fixed in accordance with practices formulated by or through The Cement Institute, that it participated in advertising respecting the "multiple basing point system," or that it was a party to any understanding, agreement or combination respecting any of said alleged practices.

5. Answering Count II, petitioner incorporated from its answer to the first count its denials and allegations with respect to the allegations of the first count incorporated in the second count of the complaint, and denied

that discrimination in price within the meaning of the Clayton Act resulted from any of its sales and denied that any of its sales or prices to any of its customers had any effect to injure, prevent, lessen or destroy competition in price in interstate commerce between it and any other respondent.

6. In addition the answer sets up affirmative matters affirmatively describing and explaining practices and policies of the company with respect to the sale and distribution of cement.

7. The answer reserved the right to move to dismiss the proceeding as against it.

C. Hearing, Motion to Dismiss and Argument Before the Commission.

8. The hearings on the issues raised by the pleadings were commenced on December 1, 1937, before a Trial Examiner appointed by the Commission and with adjournments from time to time were concluded on November 28, 1940. Motions to dismiss the complaint and to strike and limit specified evidence were made by petitioner at the close of the Commission's case in chief, and were denied without prejudice to their renewal. Petitioner thereafter filed a statement of its contentions and responded to a questionnaire submitted by the Trial Examiner. In May of 1941 the Trial Examiner filed his report upon the evidence. Petitioner duly excepted to the report. Briefs in support of the complaint were filed by the Commission and briefs in opposition were filed by petitioner and by other respondents in the proceeding. Oral argument was had before the Federal Trade Commissioners in April and May, 1942. The motions and exceptions previously made were renewed. The Commission under date of July 17, 1943, denied the motions.

D. The Order Sought to be Reviewed and Set Aside.

9. On July 17, 1943, the Commission made its Findings as to the Facts and Conclusion in which it found and concluded in favor of the Commission that Petitioner had employed unfair methods of competition in interstate commerce in violation of Section 5 of the Federal Trade Commission Act and had discriminated in price between dif-

ferent purchasers of Portland cement in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. On said July 17, 1943, the Commission made and entered its Order to Cease and Desist. A copy of the Order is attached to this petition as Exhibit A. The Findings and Order were subsequently served upon petitioner.

II.

Facts and Statutes Upon Which Jurisdiction and Venue Are Based.

A. Statutes.

10. The following are statutes under which jurisdiction of this proceeding and venue are in this court.

Section 225, Title 28, U. S. Code, vests in the Circuit Courts of Appeal power to enforce, set aside or modify orders of the Federal Trade Commission.

Section 45, Title 15, U. S. Code (Section 4 of the Federal Trade Commission Act) provides for a review of any order of the Federal Trade Commission within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business.

Section 21, Title 15, U. S. Code (Section 11 of the Clayton Act) provides for a review of any order of the Federal Trade Commission to cease and desist from a violation of the Clayton Act within any circuit where the violation complained of was or is being committed or where such person resides or carries on business.

B. The Facts as to Venue.

11. The complaint charges a combination and conspiracy in restraint of competition and the carrying out of the alleged combination and conspiracy by the doing of overt acts. The allegations of the complaint impute to Petitioner the overt acts of its alleged co-conspirators allegedly done to carry out and make effective the alleged combination and conspiracy. The complaint alleges and the Commission's findings find that the "respondents," generally and all inclusively, have done acts in furtherance of the alleged combination and conspiracy and to make it effective which obviously were not done by Petitioner and thus impute to

Petitioner the acts of other "respondents." Numerous of said acts which are thus imputed to Petitioner were done in this circuit. Furthermore The Cement Institute, of which Petitioner and other respondents are alleged to have been members, maintains its principal office in this circuit at Chicago, Illinois.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, Petitioner prays:

1. That a certified copy of this petition be forthwith served by the clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, including all of the evidence taken and the findings as to the facts and conclusion and the order to cease and desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's report upon the evidence and the exceptions filed thereto by and on behalf of this petitioner.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of this petitioner in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the exceptions filed thereto by and on behalf of this petitioner, the several motions made on behalf of this petitioner before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate, as to this petitioner, said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss, as to this petitioner, the complaint heretofore issued in the aforesaid proceeding.

Dated: August ....., 1943.

Alex. W. Davis,
Robert B. Murphy,

.....,

By Alex W. Daxis,
Attorneys for Petitioner.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8409

Monolith Portland Cement Company,
and
Monolith Portland Midwest Company,
Petitioners,

against

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Sept. 13, 1943.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Come Monolith Portland Cement Company and Monolith Portland Midwest Company, corporations duly organized in the State of Nevada, by their attorney, and jointly and severally present their petition to review and set aside the Order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on the 17th day of July, 1943, and in support thereof respectfully show:

I.

Nature of the Proceedings as to Which Review is Sought.

First: The Order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute, an unincorporated trade association, its president and former secretary, its officers and trustees, and seventy-five corporations engaged in the manufacture or sale of Portland cement, all of whom are alleged to be members of The Cement Institute. Your petitioners comprise two (2) of the aforesaid Portland cement companies.

A. The Commission's Complaint.

Second: The Commission's complaint contains two counts, both founded upon the charge that petitioners and other co-respondents have maintained a nation-wide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II an alleged resulting discrimination in prices is charged as a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Third: Count I of the complaint refers to "what is known as the multiple basing point system of pricing," as a system whereby all cement wherever produced is sold only at delivered prices. It is alleged that under this "system" there is a governing basing point for every destination in the United States and that the governing base for any particular destination is that basing point whose base price plus all rail freight produces the lowest price at the destination in question. It is charged further that the alleged agreed use of this so-called "multiple basing point system" results in the quoting of an identical delivered price by all producers who seek business at any given destination in the United States.

Fourth: Count I of the complaint also alleges that your petitioners and their co-respondents have agreed to use various enumerated practices and means in pursuance and in support of the alleged conspiracy. These alleged agreed practices are charged to be the following: an agreement to determine prices by using freight rates contained in freight rate books prepared and distributed by The Cement Institute, regardless of the accuracy of such rates and with the result that the official tariffs are allegedly nullified; an agreement to prevent the use by customers of trucks for delivery of cement; an agreement to eliminate diversions of cement in transit, it being charged that "diversions" result in concessions in delivered prices to the transferees; an agreement to prevent price competition resulting from the sale of foreign cement; an agreement to use uniform terms and discounts; an agreement arbitrarily to classify customers and to use an arbitrary definition of a "cement dealer"; an agreement to

thwart the efforts of the United States Government to secure f.o.b. mill prices on cement; and the interpretation and formulation by The Cement Institute of official policies for the industry.

Fifth: Count I also sets out a number of specific effects which are alleged to flow from the alleged combination. Among the principal alleged effects set out in the complaint are the following: the maintenance of an artificial price level and inordinately high cement prices; the destruction of the advantages which it is claimed would usually accrue to buyers located near cement mills; the elimination of a natural incentive to efficiency and economy; the use by producers of means of delivery alleged to be cheaper than rail transportation without passing on to the buyer the alleged "saving" resulting from such delivery; and generally to increase the cost of public work, to increase taxation, to deplete individual incomes and to impede prosperity. It is further alleged that the ultimate effect of the alleged combination is injury to the public.

Sixth: Count II of the complaint incorporates the allegations of Count I which charge the nation-wide combination to restrain competition in price through the agreed use of the so-called "multiple basing point system of pricing." It charges that delivered prices quoted under the alleged combination are not actual prices because they include the cost of transportation, that the true prices of each seller are the amounts realized at the mill after deduction of such transportation cost, and that the alleged variations in such mill nets, which are claimed to have resulted from the alleged combination, constitute discriminations in price by each seller among his customers in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

B. Petitioners' Answers.

Seventh: Answers to the complaint were filed by each of your petitioners and by The Cement Institute and each of the other Portland cement companies who were respondents below.

Eighth: Petitioners' separate answers deny the existence of the conspiracy which is charged; they deny the existence of a "multiple basing point system," or any other

system of pricing; they deny that there is any agreement or understanding with respect to their various practices and marketing methods; they deny the existence of any cooperative means allegedly adopted to support and implement the alleged combination; they deny any influence of The Cement Institute upon the marketing or pricing policies and practices of its members; they deny the existence of an artificial price level or excessive prices for cement; they deny that their acts have hindered, lessened or restrained competition, and that they constitute an unfair method of competition; they deny the alleged illegal discrimination in price; and they deny each and all of the alleged effects of the combination and injury to competition and to the public.

Ninth: The individual answers of your petitioners contain affirmative defenses which describe and explain their respective practices and policies with respect to the sale and distribution of cement. Considered collectively for the purposes of this petition said affirmative defenses may be summarized as follows: (Paragraphs Tenth to Fourteenth inclusive:)

Tenth: The answers state that for many years it has been customary to sell cement largely at delivered prices, but they allege that delivered prices have not been used exclusively and they deny that f.o.b. mill prices have been unavailable. They allege that the extensive use of delivered prices has not resulted from the use of any pricing system, nor from any agreement, understanding or combination, and that it is not in any sense an artificial or arbitrary method of sale. Some of the answers of your other petitioners state that their own delivered prices for cement in a given area when freight is deducted have often reflected a constant figure at their mill; that when that occurs that mill has sometimes been referred to as a "base mill"; and that the constant figure reflected has sometimes been called a "base price." The answers allege that such so-called "basing points" as may have from time to time been reflected in some delivered prices, have not been arbitrarily determined, have never been fixed in number or geographical location, and have not been the result of any agreement or understanding. The answers allege further that many delivered prices for cement do not and never have reflected any such constant or base figure and that many mills have never been so-called "base mills."

Eleventh: The answers agree, as alleged in the complaint, that Portland cement is a standardized commodity with no brand able to command a higher price (even one cent higher) than another brand and that it is a heavy, bulky commodity in which transportation charges constitute a substantial part of the cost to the buyer. The answers aver that, buyers therefore determine the brand they will purchase on the basis of the lowest cost to them delivered at their destination, and that as a result the forces of competition have come to be focused at the multitude of destinations— ities, towns and villages all over the country—where cement is used. The answers allege that, accordingly, the cement manufacturer, in order to meet competition, ordinarily quotes prices with reference to each destination and that the lowest known price quoted by any seller at the buyer's destination, irrespective of how that price may have been arrived at, must be met by any competitor who desires to sell his cement at that destination. Extensive use of delivered prices is alleged to be the natural result of this necessity for meeting competition at the buyer's destination.

Twelfth: The answers allege further that cement prices are quoted openly to dealers, contractors and other similar large scale operators who are the buyers of cement, and each of these buyers is solicited by and purchases from several manufacturers. They allege that the lowest price of any brand, therefore, becomes a matter of general knowledge and with such knowledge available, attended by the necessity of meeting the lowest price, identity of cement prices at a given market at a given time is the natural competitive result.

Thirteenth: The answers of the respective petitioners allege that all of their methods and practices have been developed independently under the stress of active competition in individual markets. They allege further that their pricing methods are highly competitive and in the best interests of all concerned in the production, sale and use of cement.

Fourteenth: Respecting Count II the answers allege that "price" in the Robinson-Patman Act does not mean mill net as alleged in the complaint, and that the "price" of cement is the amount paid by the buyer for cement delivered at destination. They allege that there has been no

injury either to buyers or sellers of cement, and that when sales are made by any cement producer at a price identical with those of any other sellers, such producer is either meeting, in good faith, the price of a competitor or its price is being met by competitors.

Fifteenth: The answers reserve the right to move to dismiss the complaint for lack of jurisdiction.

C. Hearings and Argument Before the Commission.

Sixteenth: Beginning on December 1, 1937, evidence was taken before a Trial Examiner appointed by the Commission at various cities throughout the country. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of your petitioners and their co-respondents was taken between September 5, 1939 and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940 and November 29, 1940, and on the latter date, the hearings were concluded.

Seventeeth: Motions to dismiss the complaint and motions to strike and limit evidence of the Commission were made individually on behalf of each of your petitioners and each of their co-respondents, at the close of the Commission's case in chief. The Commission denied these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, your petitioners and their co-respondents on January 27, 1941, filed a statement of Contentions and responded to a questionnaire submitted to them by the Trial Examiner, with respect to the facts proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing by your petitioners and their co-respondents. After the filing of briefs in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence were renewed. The Com-

mission under date of July 17, 1943 denied each and every one of the aforementioned motions and exceptions.

D. The Order Sought to be Reviewed and Set Aside.

Eighteenth: On July 17, 1943, the Federal Trade Commission issued, and subsequently served upon petitioners, its Findings as to the Facts and Conclusions and its Order to Cease and Desist entered thereon. A copy of said Order is annexed hereto and made a part hereof as Exhibit "A".

II.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

Nineteenth: The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid) and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid). Sec. 225, Title 28, U. S. Code, aforesaid, provides in paragraph (c):

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c). Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript

the court shall have jurisdiction of the proceeding and of the question determined therein, * * *".

Section 21 of Title 15, provides in part:

"* * * the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board.

* * * * * * *

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided."

B. The Facts as to Venue.

Twentieth: By reason of the charge of conspiracy and combination, all of your petitioners and all of their co-respondents have allegedly maintained and used in this Circuit the alleged unfair method of competition and discriminatory pricing method which are the subject of this proceeding. Moreover, The Cement Institute, of which your petitioners and their co-respondents are alleged to have been members, maintains in this Circuit, at Chicago, Illinois, its principal office and also a Freight Rate Bureau for compiling and publishing freight rate books allegedly employed in connection with the alleged unfair method of competition and discriminatory pricing method. Numerous acts, imputed to your petitioners and all of their co-respondents, including The Cement Institute, and alleged to have been done during and in furtherance of the alleged conspiracy, have occurred in this Circuit.

III.

Prayer for Relief.

Wherefore, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, Petitioners pray:

1. That a certified copy of this petition be forthwith served by the clerk of this court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the findings as to the facts and conclusion and the order to cease and desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this court the Trial Examiner's report upon the evidence and the exceptions filed thereto by and on behalf of these petitioners.

3. That this court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of these petitioners in the course of the proceedings before the Trial Examiner, the Trial Examiner's report upon the evidence, the exceptions filed thereto by and on behalf of these petitioners, the several motions made on behalf of these petitioners before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside and vacate, as to these petitioners, said Findings, Conclusion and Order to Cease and Desist and order said Commission to dismiss, as to these petitioners, the complaint heretofore issued in the aforesaid proceeding.

Dated—September 10, 1943.

W. D. Burnett,
William D. Burnett,
Attorney for Petitioners.

8410.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Blaine S. Smith, Frank G. McKelvy, Charles F. Conn, B. H. Rader, Oscar N. Lindahl, J. J. Hornung, Harold M. Scott, John J. Porter, Harry F. Jennings, Walter C. Russell, Monroe C. Monday, L. J. Capen, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Victor N. Roadstrum, Joseph S. Young, R. A. Hummel, J. B. John,

Petitioners,

against

Federal Trade Commission,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes your petitioners, Blaine S. Smith, Frank G. McKelvy, Charles F. Conn, B. H. Rader, Oscar N. Lindahl, J. J. Hornung, Harold M. Scott, John J. Porter, Harry F. Jennings, Walter C. Russell, Monroe C. Monday, L. J. Capen, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Victor N. Roadstrum, Joseph S. Young, R. A. Hummel and J. B. John, and jointly and severally present their petition to review and to set aside the Order of the Federal Trade Commission (hereinafter referred to as the "Commission") made and entered on the 17th day of July, 1943, requiring your petitioners and others to cease and desist from engaging in an alleged unfair method of competition in violation of Section 45, Title 15, U. S. Code, known as the Federal Trade Commission Act, and an alleged discrimination in price in violation of Section 13, Title 15, U. S. Code, known as the Clayton Act as amended by the Robinson-Patman Act, and in support thereof respectfully show:

I. Nature of the Proceedings as to Which Review Is Sought.

First: The order of the Commission herein sought to be set aside arises out of a complaint filed and issued by it on July 2, 1937, against The Cement Institute (hereinafter called the "Institute"), S. W. Storey and G. H. Reiter as "President" and "Secretary" thereof respectively, the "Vice-President, Treasurer and Trustees" of the Institute, and seventy-five Portland cement companies (hereinafter sometimes called "cement producers"), alleged to be members of the Institute.

Second: The Commission's complaint contains two counts, both founded upon the charge that your petitioners and their co-respondents have maintained a nationwide combination to restrain competition in price through the agreed use of a so-called "multiple basing point system of pricing." In Count I this is alleged to be an unfair method of competition under Section 5 of the Federal Trade Commission Act. In Count II it is charged that the cement producers, whenever they quote prices under the alleged "system", discriminate in price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. Count II of the complaint does not relate to the Institute or your petitioners since it is not alleged that they have discriminated in price in violation of the Robinson-Patman Act.

A. Count I of the Complaint.

Third: The complaint contains no specific allegations regarding activities of any of the officers or trustees of the Institute. It does allege that the Institute is an unincorporated trade association organized in October 1929 which is not engaged in commerce but is engaged in aiding the producing respondents to carry out alleged unlawful methods which substantially affect competition among its members. The complaint does not charge that the Institute has used a "basing point system" or any other "system" or method of pricing.

Fourth: The only specific allegations contained in the complaint regarding the Institute are the following: that, in pursuance of and in support of the alleged conspiracy to maintain the so-called "multiple basing point system of

pricing", it has prepared and distributed among cement producers freight rate books which are alleged to be used, by agreement, in determining the freight factor which will be used by them in quoting prices; that it is the function of the Institute to formulate and interpret the policies of its member companies and that Institute meetings were used for this purpose and to promote the alleged conspiracy; and finally, that by united action, public advertisements were published to camouflage the alleged combination.

B. Petitioners' Answer.

Fifth: An answer to the complaint was filed on behalf of the Institute, S. W. Storey, President, G. H. Reiter who was named as Secretary and the "Vice-Presidents, Treasurer and Trustees" of the Institute. This answer alleges that the Institute is not engaged in the manufacture and sale of cement and that it has not employed basing points, a "basing point system", or any other marketing or pricing method. This answer also denies the existence of the conspiracy charged in the complaint and sets out an affirmative defense describing the Institute and explaining its function and activities as more fully set forth in Paragraphs Sixth to Eleventh, herein inclusive.

Sixth: This answer alleges that the work of the Institute has, in the main, been purely mechanical and largely statistical, that it has never influenced or endeavored to influence the marketing policies of its members and that it has not promoted, aided or participated in any agreement or understanding concerning the pricing or marketing methods of its members or any others.

Seventh: This answer alleges further that the Institute was organized in August of 1929; that its purposes were set forth in Articles of Association which were adopted at or about that time; that Article II of said Articles set forth the purposes of the Institute as follows:

"To promote the best interests of the cement industry by providing facilities for collecting information with respect to trade and commerce therein, and disseminating such information. The information so collected and disseminated, shall be as follows:

(a) Information concerning credits.

(b) Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement.

(c) Information concerning production and stocks on hand of clinker and Portland Cement and shipments of Portland Cement, and cloth sack returns."

Eighth: This answer denies the charges in the complaint respecting the purpose and use of the freight rate books and alleges that in or about March 1930 the Institute established Freight Rate Bureaus for the purpose of publishing books and interim amendments thereto which showed all-rail freight rates on cement compiled from official carload freight rates on cement, expressed in cents per one hundred pounds, between points of actual shipments and points of actual destination, and that such books have been compiled and prepared for all states except the States of Washington, Oregon, California, Arizona, Nevada, Utah, Colorado, Wyoming, Montana and Idaho.

Ninth: It is alleged further in this answer that with the enactment of the National Industrial Recovery Act, the Institute became active in bringing together the producers of cement for the purpose of formulating a code of fair competition, as authorized by the Act; that an NIRA code for the Cement Manufacturing Industry was approved by the President of the United States on November 27, 1933; and that the Institute, although continuing its freight rate and statistical services, offered and devoted most of its facilities to the Cement Code Authority during the existence of the NIRA.

Tenth: This answer further alleges that from the time the NRA codes were invalidated by the United States Supreme Court the activities of the Institute were curtailed and limited to statistics on production, shipments and stocks on hand, the compilation and distribution of freight rate books, as aforesaid, specific job contract information (discontinued in September 1936) and the distribution of information to members on pending or recently enacted legislation and governmental regulations.

Eleventh: This answer further alleges that the application of the doctrine of stare decisis to the decision in the case of *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 (1925), establishes that all of the purposes and activities of the Institute have been specifically approved by the Supreme Court of the United States.

Twelfth: This answer further alleges that the Institute, and its officers and trustees are not engaged in com-

merce and that they have not engaged in any discrimination in price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

C. Hearings and Argument Before the Commission.

Thirteenth: Beginning on December 1, 1937, evidence was taken at various cities throughout the country, before an Examiner appointed by the Commission. Presentation of the Commission's evidence was completed on June 30, 1939. Evidence on behalf of the defense was taken between September 5, 1939 and November 13, 1940. Rebuttal evidence for the Commission was received between November 13, 1940 and November 29, 1940 and on the latter date, the hearings were concluded.

Fourteenth: Motions to dismiss the complaint, and motions to strike and limit evidence of the Commission were made individually on behalf of each of the respondents before the Commission at the close of the Commission's case in chief. The Commission denied each of these motions without prejudice to their being subsequently renewed, and they were renewed at the close of the defense. After the taking of evidence had been completed and pursuant to the request of the Trial Examiner, on January 27, 1941, the respondents before the Commission answered a questionnaire submitted to them by the Trial Examiner and filed a Statement of Contentions with respect to the facts proved. In May, 1941, the Trial Examiner filed his "Report upon the Evidence." Some exceptions to the Trial Examiner's report were filed in writing on behalf of the Commission. Extensive exceptions to said report were filed in writing on behalf of the respondents before the Commission. After the filing of brief in support of and in opposition to the complaint, oral argument was had thereupon before the Federal Trade Commissioners in late April and the early part of May, 1942. At the oral argument all motions and exceptions previously made during the course of the proceeding, including exceptions and motions regarding the conduct of the hearings and rulings on the reception and rejection of evidence, were renewed. All of these motions and exceptions were denied by the Commission.

D. The Order Sought to be Reviewed and Set Aside.

Fifteenth: On July 17, 1943, the Federal Trade Commission issued over the signature of its Secretary its Findings as to the Facts and Conclusion and its Order to Cease and Desist entered thereon against The Cement Institute, "its officers, trustees * * *" and seventy-four of the seventy-five cement manufacturing companies who were respondents before the Commission. A copy of said Order is annexed hereto and made a part hereof as Exhibit "A". The said Findings, Conclusion and Order were served upon your petitioners Blaine S. Smith, Frank G. McKelvy, Charles F. Conn, B. H. Rader, Harold M. Scott, John J. Porter, Harry F. Jennings, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Joseph S. Young and J. B. John.

II. Facts and Statutes Upon Which Venue Is Based.

Sixteenth: The statutes under which this Court has jurisdiction and venue are Section 225, Title 28 United States Code (Section 128 of the Judicial Code, as amended) and Section 45, Title 15, United States Code (Section 5 of the Federal Trade Commission Act aforesaid). Section 225, Title 28 of the United States Code, aforesaid, provides:

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c). Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence

taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have the jurisdiction of the proceeding and the question determined therein, * * *"

Seventeenth: On the 26th day of July, 1943, petitions to review and to set aside the aforesaid Order of the Commission were filed in this Court on behalf of The Cement Institute, S. W. Storey and G. H. Reiter (Cause No. 8361) and on behalf of fifty-nine of the cement producing companies named in said Order (Cause No. 8360). Subsequently, other petitions to review the said Order were filed in this Court by other cement producing companies named therein. On September 1, 1943, the Commission filed in this Court a certified copy of the transcript of the record of the proceedings before it, thereby conferring upon this court "jurisdiction of the proceeding and the question determined therein" pursuant to Section 5 of the Federal Trade Commission Act aforesaid.

Eighteenth: None of your petitioners was specifically named as a respondent in the Commission's complaint or in its Order to Cease and Desist. In addition to The Institute, S. W. Storey, G. H. Reiter and the cement producers, the complaint names as respondents "the Vice President, Treasurer and Trustees of The Cement Institute." In addition to the persons named therein, the Order is directed at the "officers, trustees, agents, representatives, and employees' of the Institute. All of your petitioners have been either officers or trustees of the Institute at one time or another during the period between the date of the issuance of the complaint and the date of the issuance of the aforesaid Order to Cease and Desist. The Institute resides and carries on business in this circuit within the meaning of Section 5 of the Federal Trade Commission Act, aforesaid, in that it maintains at Chicago, Illinois, its principal office and a freight rate bureau for compiling and publishing the aforesaid freight rate books.

Nineteenth: Your petitioners, Blaine S. Smith and Frank G. McKelvy are the Vice Presidents of the Institute and held that office at the time the complaint was filed. Your petitioner, Charles F. Conn was Treasurer of the Institute at the time the complaint was filed but ceased to hold that office on November 29, 1939 and does not now hold any office in the Institute. Your petitioner, B. H. Rader has been a Trustee of the Institute at all times since

the date of the complaint and, in addition, on November 29, 1939, he became Treasurer of the Institute and still holds that office. Your petitioner, O. N. Lindahl, was Assistant Treasurer of the Institute at the time the complaint was filed but ceased to hold that office on November 29, 1939, and does not now hold any office in the Institute. Your petitioner, J. J. Hornung is the Assistant Treasurer of the Institute and has held that office since November 29, 1939. Your petitioners, Harold M. Scott, John J. Porter, Harry F. Jennings, Monroe C. Monday, Chester A. Brooke, Charles Boettcher, Blaine S. Smith, Victor N. Roadstrum, Frank G. McKelvy and Joseph S. Young are Trustees of the Institute and have held office as Trustees at all times since the date of the complaint. Your petitioners, Walter C. Russell and L. J. Capen are and have been Trustees of the Institute since September 14, 1938, and your petitioner, R. A. Hummel is and has been a Trustee of the Institute since November 26, 1941. Your petitioners, Ernest E. Duque, Edwin P. Lucas and J. B. John were Trustees of the Institute at the date of the issuance of the complaint but have since ceased to hold either the office of Trustee or any other office in the Institute. Your petitioners, Ernest E. Duque and Edwin P. Lucas ceased to be Trustees of the Institute on May 21, 1941 and your petitioner, J. B. John ceased to be a Trustee on September 31, 1938.

III. Prayer for Relief.

Wherefore, believing that the aforesaid Findings, Conclusion and Order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray that this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and their co-respondents in the course of the proceeding before the Trial Examiner, the Trial Examiner's report upon the evidence, the Exceptions filed thereto by and on behalf of your petitioners and their co-respondents, the several motions made on behalf of petitioners and their co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings as to the Facts and Conclusion, and set aside and vacate said Findings;

Conclusion and Order to Cease and Desist, and order said Commission to dismiss its complaint herein.

Dated: September 10th, 1943.

Donovan, Leisure, Newton & Lumbard,
By George S. Leisure,
Partner,
Attorneys for the above-named Petitioners.

UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—8360—8361—8410)

STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY.

(Filed Mar. 20, 1944. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioners in Case No. 8360,* Aetna Portland Cement Company (Aetna), Alpha Portland Cement Company (Alpha), Arkansas Portland Cement Company (Arkansas), Ash Grove Lime and Portland Cement Company (Ash Grove), Bessemer Limestone and Cement Company (Bessemer), Colorado Portland Cement Company (Colorado), Consolidated Cement Corporation (Consolidated), Coplay Cement Manufacturing Company (Coplay), Cumberland Portland Cement Company (Cumberland), Dewey Portland Cement Company (Dewey), Diamond Portland Cement Company (Diamond), Edison Cement Corporation (Edison), Federal Portland Cement Company, Incorporated (Federal), Florida Portland Cement Company (Florida), Georgia Cement and Products Company (Georgia), Giant Portland Cement Company (Giant), Glens Falls Portland Cement Company (Glens Falls), Great Lakes Portland Cement Company (Great Lakes), Gren Bag Cement Company of West Virginia (Green Bag W. Va.), Green Bag Cement Company of Pennsylvania (Green Bag Pa.), Hawkeye Portland Cement Company (Hawkeye), Hercules Cement Corporation (Hercules), Hermitage Portland Cement Company (Hermitage), Idaho Portland

*All petitioners are hereinafter referred to by the designation in parenthesis given after their names.

Cement Company (Idaho), Keystone Portland Cement Company (Keystone), Kosmos Portland Cement Company (Kosmos), Lawrence Portland Cement Company (Lawrence), Lehigh Portland Cement Company (Lehigh), Lone Star Cement Corporation (Lone Star), Medusa Portland Cement Company (Medusa), Missouri Portland Cement Company (Missouri), Monarch Cement Company (Monarch), National Cement Company (National), Nazareth Cement Company (Nazareth), Nebraska Cement Company (Nebraska), North American Cement Corporation (North American), Northwestern States Portland Cement Company (Northwestern States), Oklahoma Portland Cement Company (Oklahoma), Oregon Portland Cement Company (Oregon), Peerless Cement Corporation (Peerless), Pennsylvania-Dixie Cement Corporation (Penn-Dixie), Petoskey Portland Cement Company (Petoskey), Pittsburgh Plate Glass Company (Pittsburgh), Portland Cement Company of Utah (Utah), Signal Mountain Portland Cement Company (Signal Mountain), Southern States Portland Cement Company (Southern States), Southwestern Portland Cement Company (Southwestern), Standard Portland Cement Company (Standard), Superior Cement Corporation (Superior), Three Forks Portland Cement Company (Three Forks), Trinity Portland Cement Company (Trinity), Union Portland Cement Company (Union), Valley Forge Cement Company (Valley Forge), Volunteer Portland Cement Company (Volunteer), Vulcanite Portland Cement Company (Vulcanite), Wabash Portland Cement Company (Wabash), West Penn Cement Company (West Penn), Whitehall Cement Manufacturing Company (Whitehall), Wolverine Portland Cement Company (Wolverine), and,

Your petitioners in Case No. 8361, The Cement Institute, an unincorporated association; S. W. Storey and G. H. Reiter, and

Your petitioners in Case No. 8410, Blaine S. Smith, Frank G. McKelvy, Charles F. Conn, B. H. Rader, Oscar N. Lindahl, J. J. Hornug, Harold M. Scott, John J. Porter, Harry S. Jennings, Walter C. Russell, Monroe C. Monday, L. J. Capen, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Victor N. Roadstrum, Joseph S. Young, R. A. Hummell and J. B. John,

Having duly filed with this Court on the 26th day of

July, 1943 (Cases Nos. 8360 and 8361), and on the 13th day of September, 1943 (Case No. 8410) their petitions to review and to set aside an Order to Cease and Desist of the Federal Trade Commission (hereinafter called the Commission), made and entered on the 17th day of July, 1943, now, pursuant to the orders of this Court duly made and entered on the 6th and 18th days of August, the 20th day of September, and the 15th day of December, 1943, severally make and file the following Statement of Points setting out the assignments of errors which each of them intends to urge and rely upon in support of their said petition.

I.

The Commission erred in making and entering its Order to Cease and Desist herein as follows:

1. The Order is unlawful and exceeds the jurisdiction of the Commission, in that it abridges and nullifies petitioners'* constitutional right to meet competition in violation of the 5th Amendment to the Constitution of the United States and unlawfully usurps the legislative functions and powers of Congress in violation of Article I, Section 1 of the Constitution of the United States by limiting and proscribing beyond the Commission's power the methods of competition which petitioners may employ, and enjoins, proscribes and fetters petitioners' right to engaged in free and fair competition and to sell cement at delivered prices.

2. The Order is unlawful and exceeds the jurisdiction of the Commission, in that there is no evidence that petitioners or any of them have entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination or conspiracy, or threatened so to do, with respect to doing or performing any of the acts and things prohibited in Paragraphs 1 through 4 of said Order, in violation of Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, or both.

3. The Order is unlawful and exceeds the jurisdiction of the Commission in what it enjoins methods of competition and acts and practices which are not specified in the complaint and are not within the issues raised by the plead-

*The petitioners in Cases Nos. 8361 and 8410 are not and never have been engaged in the production and sale of cement. This statement applies to each assignment of error hereinafter made on behalf of "petitioners".

ings, in so far as it requires petitioners or any of them to do or to refrain from doing any of the following things**:

(a) to "cease and desist from * * * *continuing, cooperating in,* or *carrying out any planned common course of action* * * * between any two or more * * * [of them] *or between any one or more* * * * [of them] *and others not parties* hereto" [preamble];

(b) from "* * * quoting or selling cement pursuant to or in accordance with *any other plan* or system *which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers* by respondents using such plan or system, or *which prevents purchasers from finding any advantage in price* in dealing with one or more of the respondents" [Paragraph 1];

(c) from doing the things enumerated in Paragraph 2 (a) to (p) "in connection with or in aid or support of *any* plan, system, acts or practices prohibited in paragraph 1 above" [Paragraph 2], in so far as this refers to "*any* planned common course of action, understanding, agreement, combination, or conspiracy" or "*any* plan or system which results in identical price quotations" or "which prevents purchasers from finding any advantage in price" [Paragraph 1];

(d) from "refusing or declining * * * to allow purchasers to provide transportation by *any* means, at *any* cost, or to *any* place they may desire" when quoting or selling at a price f.o.b. mill [Paragraph 2(b)];

(e) from "*collecting, compiling and circulating or exchanging statistical data* which reveals the individual production, stocks, sales, or shipments of cement of any corporate respondent to other corporate respondents" [Paragraph 2(n)];

(f) from "using *any* means *substantially similar* to those specifically set out in this order with the purpose or effect of accomplishing *any* of the things prohibited by this order" [Paragraph 4].

4. The Order is unlawful and exceeds the jurisdiction of the Commission, in that it is so vague, indefinite and ambiguous as not to provide or constitute a standard of conduct by which petitioners can reasonably be expected to be governed in the conduct of their affairs, in so far as it requires petitioners or any of them to do or to refrain from

** The matters in italics serve to point out the particular language which is objectionable.

doing any of the things heretofore referred to in Assignment No. 3 (a) through (f), *supra*, or any of the following additional things*:

(a) "Quoting or selling cement *ostensibly at f.o.b. mill prices*, but which prices * * * are *systematically equivalent to* identical delivered costs * * * from differently located mills [Paragraph 2(d)];

(b) from "*systematically*" including a "*freight factor*" in delivered prices which represents transportation by a common carrier having higher rates than the means of transportation actually employed" [Paragraph 2(g)];

(c) "Quoting or selling * * * at destination-cost figures accompanied by a requirement that * * * the f.o.b. mill price shall be determined by making *specified deductions* from said destination-cost figures" [Paragraph 2(h)];

(d) "Determining upon *any* basis for the selection or classification of customers or using *any* basis * * * for selecting or classifying customers" [Paragraph 2(l)];

(e) "Determining upon * * * *other terms or conditions* of sale" [Paragraph 2(p)];

(f) "*Discriminating in price* * * * by *systematically* charging and accepting *mill net prices* which differ by the amounts necessary to produce" identical delivered costs;

(g) "Using *any means substantially similar* to those specifically set out in this order with the purpose or effect of accomplishing *any* of the things prohibited by this order" [Paragraph 4].

5. Paragraph 2(j) of the Order is unlawful and exceeds the jurisdiction of the Commission under Section 5 of the Federal Trade Commission Act in that it prohibits the compilation and circulation of accurate freight rate information and the use of any such information so compiled and circulated, and further, in that it prohibits the compilation of such information by one of the petitioners for its own use.

6. Paragraph 2(n) of the Order is unlawful and exceeds the jurisdiction of the Commission under Section 5 of the Federal Trade Commission Act in that it prohibits the collection, compilation and circulation or the exchange of statistical data which reveal the individual production, stocks, sales or shipments of cement and Paragraph 2(o) of the Order is unlawful and exceeds the jurisdiction of the

* The matters in italics serve to point out the particular language which is objectionable.

Commission in that it is directed against the petitioners named in subparagraph (a) of Assignment No. 29 below, none of whom has ever sold cement in competition with imported cement or has any fixed policy or practice with respect thereto.

7. Paragraph 3 of the Order is unlawful and exceeds the jurisdiction of the Commission in that it abridges and nullifies petitioners' constitutional right to meet competition in violation of the 5th Amendment to the Constitution of the United States.

8. The Order is unlawful and exceeds the jurisdiction of the Commission under Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, or both, in that:

(a) There is no evidence that petitioners' methods of sale are or have been unfair and injurious to any competitor, class of competitors or class of persons competing with petitioners.

(b) There is no evidence that petitioners' methods of sale are, have been, or threaten to be detrimental or injurious to or against the interests of the public.

(c) The Order enjoins, proscribes and fetters methods with respect to the offering for sale, sale and distribution of Portland cement by petitioners which are shown by the evidence to be the direct result of and conducive to competition, as well as advantageous to the interests of the public.

(d) The Commission unlawfully delegated to its Trial Examiner the power to hold hearings and take evidence with respect to the alleged violations of the Clayton Act.

(e) The Order is not suppported by the purported "Findings as to the Facts and Conclusion" of the Commission.

II.

The Commission erred in making its Findings as to the Facts and Conclusions, as follows:

9. The purported "Findings as to the Facts" are not supported by the evidence, go beyond the issues and are improper in form and substance, and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of Findings as to the Facts provided for by law and upon which any order herein may be based, in that:

(a) The Commission has failed to consider and to make

findings of fact as to all of the evidence that is material to all of the issues and in making its purported "Findings as to the Facts" has considered and has made its findings based only on a small part of the evidence and has ignored and has made no findings whatsoever based on large quantities of direct and uncontradicted evidence in support of the respective defenses of petitioners and their co-respondents below and on evidence which met, explained, contradicted and otherwise related to evidence presented by the Commission. If the Commission had considered and made findings as to all of the material evidence, as above stated, there would be no basis in fact for the findings as made and for the Order entered thereon.

(b) The Commission has failed to indicate in said findings which of the petitioners are allegedly shown by the evidence to be connected with all or any of its extensive findings, but has merely referred to "respondents", "the respondents", "a number of the respondents", "some respondents", "respondents in different localities", "other respondents", "producers", "the cement industry and its members" and similar ambiguous and indefinite terminology, to imply the connection of all or some of the petitioners with matters referred to in a particular finding, without any finding to designate, name or otherwise identify which, if any, of the petitioners are actually connected with or claimed to be connected with said matters.

(c) The extensive quotations of, excerpts from and references to testimony and exhibits in the findings are incomplete, misleading and do not fairly represent or characterize the evidence.

(d) Vague, ambiguous and misleading characterizations such as "multiple basing-point delivered-price system", "pricing formula", "pricing system", "substantial interrelationships", "philosophy of competition", "collective action", have been employed to raise implications and inferences not only not warranted or supported by the evidence, but directly contrary to the direct evidence.

(e) The findings, in so far as they find or imply in Paragraphs One through Twenty-six and in the Conclusion, that petitioners or any of them have entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination or conspiracy, or threatened to do so, or have done any of the things found to have been done by any of the petitioners in support of any such planned common course

of action, understanding, agreement, combination or conspiracy, as charged in the complaint or otherwise, are not supported by the evidence.

(f) The Commission erred in making its findings in giving any consideration or weight to or making any findings as to a large quantity of evidence improperly admitted relating to activities of certain trade organizations, cement producers and others in the cement industry that were carried on from 1902 to 1919 (reference is made to Paragraphs 5, 6(a), 7(i), (j), (k), 8(b), (d), 13(c), 14(b), (c), 15(b), 17(b) and 20(a), (c) of the findings in each of which there are extensive references to such evidence) on the ground that those activities are too remote in time to have any relevance to any issue in this case, that the Commission has not shown any connection between any of such evidence and these petitioners, that at the time the incidents took place to which this evidence relates a large number of petitioners were not in existence and a large number of petitioners that were in existence at those times had no connection with such incidents, that all of such evidence relates to years prior to 1919 and all of it was either in evidence in the case of *Cement Manufacturers' Protective Association* v. *United States*, 268 U. S. 588 (1925) or related to the subject matter and the issues of that case, and that such evidence furnishes no support for any finding or inference as to any issue in this case.

(g) The Commission erred in making its findings in giving any consideration or weight to or making any findings as to a large quantity of evidence relating to the activities of petitioners and other members of the cement industry, pursuant to or arising out of the National Industrial Recovery Act, the preparation and administration of or activities relating to the NRA Code, or action by the Code Authority and other matters connected with or arising out of NRA (reference is made to Paragraphs 5, 7(p), (q), (r), 8(j), (k), (l), (m), 9(b), (c), 10(g), 11(g), 12(b), 13(f), 14(f), (g), 15(g), (h), 16(a), (b), (c), (d), (f), 17(d), (e), 18(b), 20(a) and 21(f) of the findings in each of which there are extensive references to such evidence) on the ground that such evidence furnishes no support for any finding or inference as to any issue in this case.

(h) The purported "Finding as to the Facts" include findings which go beyond the charges in the complaint and which are outside the scope of the issues upon which the case was tried before the Commission.

10. The finding in the preamble to the Commission's findings that the proceeding is in the interest of the public is not supported by the evidence.

11. With respect to Paragraph One:

(a) The Commission's finding in subparagraph (a) with respect to the purpose for which The Cement Institute was organized is not supported by the evidence and the Commission erred further in failing to find the material facts showing the origin, purposes and circumstances surrounding the organization of the Institute and the rise and fall of its membership and activities from the date of its organization to the date of the complaint herein.

(b) The Commission erred in subparagraph (a) in failing to find the material fact that petitioner Valley Forge Cement Company is not and has never been a member of the Institute.

(c) The Commission erred in subparagraphs (e), (f), (g), (h), (j), (n), (o), (p), (r), (s), (t), (u), (v), (z), 2(a), 2(b), 2(c), 2(d), 2(g), 2(h), 2(i), 2(j), 2(k), 2(l), 2(p), 2(u), 2(v), 2(y), 2(z), 3(e), 3(i), 3(k), 3(m), 3(p), 3(q), 3(r), 3(u), 3(v), 3(w), 3(y), and 3(z) in failing to find the material fact that petitioners Aetna, Alpha, Arkansas, Ash Grove, Bessemer, Colorado, Consolidated, Coplay, Dewey, Diamond, Edison, Federal, Florida, Great Lakes, Green Bag Pa., Green Bag W. Va., Hawkeye, Hercules, Idaho, Lone Star, Keystone, Kosmos, Lawrence, Lehigh, Monarch, Nebraska, North American, Oklahoma, Oregon, Pittsburgh, Signal Mountain, Southwestern, Standard, Three Forks, Trinity, Union, Volunteer, Vulcanite, Wabash, Whitehall and Wolverine, joined the Institute during the period of national emergency solely for the purpose of supporting the National Industrial Recovery Act by participating in the formulation and administration of the NRA Code for the Portland Cement Industry.

(d) The Commission erred in subparagraphs 2(d), 3(p) and 3(r), respectively in failing to find that the following petitioners had no connection with and were not members of the Institute during the following periods: Hercules—February 1931 to June 1933; Three Forks and Union—February 1936 to February 1937.

12. With respect to Paragraph Two:

(a) The Commission erred in failing to find the material fact that no cement mill sells or ships cement on a national

scale and that each petitioner sells only in a limited area—normally about 250 miles in radius—surrounding its mill or mills, as the case may be.

(b) The Commission erred in failing to find the material fact that petitioners Valley Forge Cement Company and Great Lakes Portland Cement Corporation are engaged solely in the manufacture of Portland cement and do not sell cement in competition with any other petitioner.

(c) The statement that the individuals named in Sections (a) to (d) inclusive, of Paragraph One, have "participated in, aided, assisted, and cooperated with the other respondents in planning, doing and performing the acts and practices hereinafter set forth" is not supported by the evidence and is so vague and indefinite as not to constitute a finding upon which the Order herein may be based.

13. With respect to Paragraph Three:

(a) The Commission erred in subparagraph (a) in failing to find that Portland cement can only be manufactured in highly specialized factories requiring a large amount of expensive and specialized equipment; that large capital investments are necessary; that cement mills have high overhead or fixed costs per barrel of capacity; that cement mills are located in proximity to sources of raw material and fuel; and other material facts dealing with the growth and spread of this industry, the modernization and maintenance of efficiency of cement mills, the elimination of obsolete plants, the capacity of cement mills and the relation of capacity to demand, high investment costs and storage problems.

(b) The findings in subparagraph (a) that freight charges of from 30¢ to 60¢ per barrel for delivery of cement are "quite usual", and that charges of approximately $1 per barrel are "not uncommon" are not supported by the evidence.

(c) The finding in subparagraph (b), that in some of the uses of cement therein specified, the cost of the cement constitutes a "very substantial part of the total cost of all materials used in the project" is not supported by the evidence, and the Commission erred further in failing to find the material facts based on uncontradicted evidence that the cost of cement is but a small percentage of the total cost of all materials used in the different types of projects in which cement is used and an even smaller percentage of the total cost of all such projects.

(d) The statement in subparagraph (c) that during the period from 1930 to 1937 governmental purchases became an "unusually important outlet" for cement is not supported by the evidence and further, is so vague and indefinite as not to constitute a finding upon which the Order herein may be based; and the Commission erred further in failing to find that for over 30 years, and during the seven year period mentioned dealers have been the most important class of customers, sales to dealers among the different petitioners constituting from 60% to 100% of their total sales.

(e) The Commission erred in subparagraph (d) in failing to find that cement is also sold in bulk.

14. With respect to Paragraph Four:

(a) The finding in subparagraph (a) that 26 of the corporate respondents account for approximately three-fourths of the total capacity of the industry is not supported by the evidence.

(b) The finding in subparagraph (b) that all of the officers and directors of Valley Forge are officers and directors of Allentown Portland Cement Company is not supported by the evidence.

(c) The Commission erred in subparagraph (b) in failing to find that none of the so-called relationships among some companies therein referred to controlled or affected the individual pricing and marketing practices and policies of any of said companies.

(d) The statements in subparagraph (b) and (c) that there are "substantial interrelationships among a number of the corporate respondents", that a large proportion of the industry is concentrated in the control of "relatively few individuals", that there are "existing relationships among numerous companies" and that the said alleged control and existing relationships have "aided in creating and maintaining unity of purpose" are not supported by the evidence and further are so vague and indefinate as not to constitute findings upon which the Order herein may be based.

(e) The conclusion in subparagraph (c) that the Institute was an effective vehicle for the formulation, expression and execution of collective plans and purposes is not supported by the evidence.

15. With respect to Paragraph Five:

(a) The finding that the membership of the Association of American Portland Cement Manufacturers ultimately included "substantially all domestic cement manufacturers" is not supported by the evidence and is vague, inadequate and misleading, and the Commission erred further in failing to find the material facts that the following thirty-eight petitioners, thirty of whom are petitioners herein, were never members of or had any connection with said Association:

Aetna	*Lone Star*
Arkansas	*Monolith*[4]
Beaver[1]	*Monolith Midwest*[4]
Bessemer	*National*
Calaveras[1]	*Nebraska*
California[3]	*North American*
Consolidated	*Northwestern*[2]
Cumberland	Oregon
Federal	*Penn Dixie*
Florida	*Petoskey*
Georgia	*Pittsburgh*
Great Lakes	*Signal Mountain*
Green Bag Pa.	Southern States
Green Bag W. Va.	*Spokane*[1]
Hawkeye	*Standard*
Hercules	*Valley Forge*
Hermitage	*Volunteer*
Idaho	*West Penn*
Keystone	*Yosemite*[1]

and that, in fact, thirty-three of the aforesaid petitioners (italicized) were not in existence during the life of said Association.

(b) The statement in Paragraph Five regarding the Association of Licensed Cement Manufacturers is vague, inadequate and misleading and the Commission erred further in failing to find that the following sixty-five petitioners, fifty-one of whom are petitioners herein, were

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8389.
[3] Petitioner in Case No. 8402.
[4] Petitioner in Case No. 8409.

never members of nor had any connection with said Association:

Aetna
Arkansas
Ash Grove
Beaver[2]
Bessemer
Calaveras[2]
California[7]
Colorado
Consolidated
Coplay
Cumberland
Dewey
Diamond
Federal
Florida
Georgia
Giant
Great Lakes
Green Bag W. Va.
Green Bag Pa.
Hawkeye
Hercules
Hermitage
Huron[3]
Idaho
Keystone
Kosmos
Lone Star
Marquette[1]
Medusa
Missouri
Monarch
Monolith[8]
Monolith Midwest[8]
National
Nebraska
North American
Northwestern[5]
Northwestern States
Oklahoma
Oregon
Pacific[2]
Peerless
Penn Dixie
Petoskey
Pittsburgh
Riverside[6]
Santa Cruz[2]
Signal Mountain
Southern States
Southwestern
Spokane[2]
Standard
Superior
Superior Inc.[4]
Three Forks
Trinity
Union
Utah
Valley Forge
Volunteer
Wabash
West Penn
Wolverine
Yosemite[2]

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[1] Petitioner in Case No. 8371.
[2] Petitioner in Case No. 8372.
[3] Petitioner in Case No. 8373.
[4] Petitioner in Case No. 8386.
[5] Petitioner in Case No. 8389.
[6] Petitioner in Case No. 8393.
[7] Petitioner in Case No. 8402.
[8] Petitioner in Case No. 8409.

(c) The findings in Paragraph Five regarding the Cement Manufacturers Protective Association are vague, indefinite and misleading and the Commission erred further in failing to find that this Association went out of existence in December, 1921 and that the following sixty-three petitioners, forty-nine of whom are petitioners herein, were never members of nor had any connection with said Association:

Aetna
Arkansas
Ash Grove
Beaver[2]
Bessemer
Calaveras[2]
California[7]
Colorado
Consolidated
Cumberland
Dewey
Diamond
Federal
Florida
Georgia
Great Lakes
Green Bag W. Va.
Green Bag Pa.
Hawkeye
Hermitage
Huron[3]
Idaho
Keystone
Kosmos
Lone Star
Marquette[1]
Medusa
Missouri
Monarch
Monolith[8]
Monolith Midwest[8]
National
Nebraska
North American
Northwestern[5]
Northwestern States
Oklahoma
Oregon
Pacific[2]
Peerless
Penn Dixie
Petoskey
Pittsburgh
Riverside[6]
Santa Cruz[2]
Signal Mountain
Southern States
Southwestern
Spokane[2]
Standard
Superior
Superior Inc.[4]
Three Forks
Trinity
Union
Utah
Valley Forge
Volunteer
Wabash
West Penn
Whitehall
Wolverine
Yosemite[2]

[1] Petitioner in Case No. 8371.
[2] Petitioner in Case No. 8372.
[3] Petitioner in Case No. 8373.
[4] Petitioner in Case No. 8386.
[5] Petitioner in Case No. 8389.
[6] Petitioner in Case No. 8393.
[7] Petitioner in Case No. 8402.
[8] Petitioner in Case No. 8409.

and that, in fact, twenty-eight of the aforesaid petitioners (italicized) were not in existence during the life of said Association.

(d) The finding that the Institute "has continued" from the time of its organization in 1929 to the "present time" is not supported by the evidence, and the Commission erred further in failing to find that the Institute was dormant for a period of over two years prior to the enactment of NIRA, that its membership began to diminish shortly after its formation so that by the end of 1931 only thirteen petitioners were members and that the revival of the Institute was brought about at the time of NRA solely for the purpose of enabling the industry to qualify for the submission of a code of fair competition under NIRA and furthermore that following the invalidation of NIRA the membership of the Institute declined and its activities were curtailed.

(e) The finding that the Institute controlled "the administration of the Code for the Cement Industry" is not supported by the evidence.

(f) The statements with respect to "other groups or associations of cement producers" and the designation of "some of the respondents in this proceeding" as members of such "groups or associations" are vague, indefinite and misleading and do not constitute findings upon which the Order herein may be based.

16. With respect to Paragraph Six:

(a) The statements in subparagraph (a) that the "cement industry" has evidenced a strong aversion to "free competition", and that "its members have, by understandings and agreements, developed and maintained a substantial uniformity of action" regarding "practically every marketing procedure" are not supported by the evidence, and are so vague, indefinite and misleading as not to constitute findings upon which the Order herein may be based and the Commission has further erred in failing to make any findings on the subject of the conditions in the cement industry that have brought about such uniformity as exists in the marketing of cement.

(b) The statements in subparagraph (a), in so far as they refer to petitioners merely as "some", "other", and "few" and to practices used by cement manufacturers

designated as "some"; "other", "similar", and "collective" are so vague, indefinite and misleading as not to constitute findings upon which the Order herein may be based.

(c) The statements in subparagraph (a), that there has been a "remarkable continuity of action", that some of the current practices in the industry originated in "agreements" and have "persisted" or have been "modified" or "extended" with the support of "collective action" are not supported by the evidence and are so vague and indefinite as not to constitute findings upon which the Order herein may be based.

(d) The statements in subparagraph (b) are not supported by the evidence, and further, are so indefinite, argumentative, speculative and so replete with vague generalities and the incomplete and misleading recitation of evidence as not to constitute findings upon which the Order herein may be based.

(e) The findings in subparagraph (c) that the "general practice and policy" is to "maintain * * * uniformity in prices and terms and conditions of sale by all manufacturers" and that cement is sold without substantial competition in quality, price or terms and conditions of sale are not supported by the evidence.

17. With respect to Paragraph Seven:

(a) The Commission erred in subparagraph (a) in failing to make any finding based upon the abundant material evidence showing the sale of cement at f.o.b. mill prices by all petitioners and showing that as to some petitioners, a substantial part of their total sales has been at f.o.b. mill prices.

(b) The finding in subparagraph (a) that "respondents use a multiple basing point system" and a "formula" and the purported illustration of the use of the alleged "system" and "formula" are not supported by the evidence.

(c) The Commission erred in subparagraph (b) in failing to find the material facts as to which petitioners have operated base mills and non-base mills and when; the time and the number of changes from base to non-base mills and vice versa, and the reasons and circumstances causing such changes.

(d) The finding in subparagraph (c), purporting to describe what "a non-base mill" does in determining its prices is not supported by the evidence.

(e) The Commission erred in subparagraph (d) in failing to make any findings as to the material facts showing the reason for the location of basing points at locations where no cement is produced and the reason why there are basing points common to a number of mills.

(f) The findings in subparagraph (e) are not supported by the evidence.

(g) The Commission erred in subparagraph (f) in stating that the incomplete portions of testimony cited are truly descriptive and illustrative of the evidence.

(h) The findings in subparagraph (g) are not supported by the evidence in so far as they infer that the hypothetical illustration there set forth is the "system of pricing" actually and invariably employed by any or all or even one petitioner, or that delivered prices for cement in any area rigidly or invariably reflect some base price plus freight.

(i) The findings in subparagraph (h), in so far as they refer to a "pricing formula" and the extension of the alleged formula by "understandings and agreements" are not supported by the evidence.

(j) The finding in subparagraph (h) that the "existence of delivered price selling and f.o.b. mill selling had an unsettling effect upon prices" is not supported by the evidence and the Commission erred further in failing to make accurate or proper findings based on the abundant, material evidence showing the historical and natural development of delivered prices and the fundamental reasons therefor.

(k) The finding in subparagraph (i) in so far as it implies any agreement or understanding among petitioners regarding prices and pricing methods is not supported by the evidence.

(l) The Commission erred in subparagraph (i) in failing to find that, in addition to thirty-eight of the petitioners (as more particularly set forth in Assignment No. 15(a) herein) who were never members of the Association of American Portland Cement Manufacturers, seventeen petitioners and six co-petitioners, or a total of sixty-one, were

not members or did not attend the meeting of December 1904:

Ash Grove	*Riverside*[4]
Colorado	*Santa Cruz*[1]
Dewey	*Southwestern*
Giant	*Superior*
Huron[2]	*Superior Inc.*[3]
Kosmos	*Three Fork*
Missouri	*Trinity*
Monarch	*Union*
Northwestern States	*Universal*[5]
Oklahoma	*Utah*
Pacific[1]	Wabash
Peerless	

and that, in fact, seventeen of these petitioners (italicized) were not in existence in 1904; that in addition to the sixty-one petitioners listed above, five additional petitioners, or a total of sixty-six, were not members or did not attend the meeting of April 1905

Diamond	Nazareth
Edison	Wolverine
Glens Falls	

that in addition to the thirty-eight petitioners, as set forth in Assignment No. 15(a), twenty-one petitioners and six co-petitioners, or a total of sixty-five, were not members or did not attend the meeting of September 1905:

Alpha	Peerless
Ash Grove	*Riverside*[4]
Colorado	*Santa Cruz*[1]
Dewey	*Southwestern*
Giant	*Superior*
Glens Falls	*Superior Inc.*[3]
Huron[2]	*Three Forks*
Kosmos	*Trinity*
Missouri	*Union*
Monarch	*Universal*[5]
Nazareth	*Utah*
Northwestern States	Wabash
Oklahoma	Whitehall
Pacific[1]	

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8373.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8393.
[5] Petitioner in Case No. 8399.

and that, in fact, seventeen of these petitioners (italicized) were not in existence in 1904; that in addition to the thirty-eight petitioners, as set forth in Assignment No. 15(a), twenty petitioners and five co-petitioners, or a total of sixty-three were not members or did not attend the meeting of September 1906:

Ash Grove	Oklahoma
Colorado	Pacific[1]
Dewey	*Riverside*[4]
Diamond	Santa Cruz[1]
Giant	*Southwestern*
Glens Falls	*Superior*
Huron[2]	*Superior Inc.*[3]
Kosmos	*Three Forks*
Lawrence	*Trinity*
Missouri	Union
Monarch	*Utah*
Nazareth	Wabash
Northwestern States	

and that, in fact, twelve of these petitioners were not in existence; that in addition to the thirty-eight petitioners, set forth in Assignment No. 15(a), eleven petitioners and five co-petitioners, or a total of fifty-four were not members or did not attend the meeting of September 1908

Colorado	*Riverside*[4]
Giant	Santa Cruz[1]
Glens Falls	Southwestern
Huron[2]	Superior Inc.[3]
Lawrence	Three Forks
Missouri	*Trinity*
Monarch	Union
Pacific[1]	*Utah*

and that, in fact, four of these petitioners were not in existence during 1908; and the Commission erred further in failing to find that the "Nazareth" Company referred to in said paragraph is not the petitioner, Nazareth Cement Company; and in further failing to find that the statements attributed to members of the Association include the following: Helderberg Portland Cement Company, Omega Portland Cement Company, Newaygo Portland Cement Com-

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8373.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8393.

pany, and Dexter Portland Cement Company, none of which companies was a respondent in the proceedings before the Commission.

(m) The findings in subparagraph (j) regarding the so-called license agreement are vague, indefinite and misleading and the Commission erred further in failing to find that sixty-five of the petitioners, as more particularly set forth in Assignment No. 15 [b] herein) were not at any time members of the so-called license agreement.

(n) The finding in subparagraph (k) in so far as it refers to a "price system" and the "extension" thereof is not supported by the evidence and the findings in said subparagraph are further inadequate, vague and misleading in that the Commission failed to find that the thirty-eight petitioners, as set forth in Assignment No. 15(a), and thirteen petitioners with five co-petitioners, or a total of fifty-six, were not members or in attendance at the meeting referred to:

Alpha	*Riverside*[4]
Colorado	Santa Cruz[1]
Giant	Southwestern
Glens Falls	Superior Inc.[3]
Huron[2]	Three Forks
Kosmos	Trinity
Lehigh	Union
Pacific[1]	Utah
Peerless	Whitehall

and that, in fact, two of these petitioners (italicized) were not in existence at that time.

(o) The implication in subparagraph (1) that the evidence referred to therein either describes or illustrates the development of methods of pricing which are employed by petitioners in the "West" is not supported by the evidence and the Commission erred further in failing to find on the subject of the variety of methods employed by petitioners in the marketing of cement on the Pacific Coast.

(p) The Commission erred in subparagraph (l) in failing to find that the prices, terms, conditions and methods referred to in the evidence cited have undergone numerous changes and variations since 1915; that f.o.b. mill prices

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8373.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8393.

have often since been used by the companies referred to; and that there has been no adherence by any of the petitioners to any of the matters and things referred to in the evidence cited.

(q) The findings in subparagraphs (m) and (n) in so far as they imply the use of a "multiple basing-point delivered-price system" or the "extension" thereof by petitioners are not supported by the evidence.

(r) The finding in subparagraph (o), that the "multiple basing-point delivered-price system" was one of the "customs and usages to be maintained" by the Institute is not supported by the evidence.

(s) The finding in subparagraph (o), that the Code of Ethics of the Institute remained in effect until the beginning of the NRA Code period is not supported by the evidence; and the Commission erred further in failing to find the material fact that no effort was ever made to police the Code of Ethics, that there was no provision for its enforcement, that it was dormant, with the Institute, beginning in the Spring of 1931; and that none of the petitioners ever adopted or used the sales contract recommended therein.

(t) The finding in subparagraph (o) in so far as it implies the existence of a "multiple basing-point delivered-price system" is not supported by the evidence.

(u) The finding in subparagraph (p), that at the time of the NRA, the "multiple basing-point system" of delivered prices was in effect in the cement industry throughout the United States is not supported by the evidence, and the Commission erred further in failing to make any findings respecting the abundant material evidence showing the nature, extent and shifting of the many areas where cement prices have not and do not reflect any so-called "base prices".

(v) The findings in subparagraph (p), in so far as they suggest the use of "the pricing system" in the cement industry and the "efforts" of the Institute in behalf of such alleged system, are not supported by the evidence; and the Commission erred further in failing to find that immediately prior to the enactment of NIRA, the Institute was dormant, had only twenty members and that it had held no meetings and carried on no functions other than the preparation and dissemination of freight rates for a period of two years; that the Institute was revived

solely for the purpose of providing a vehicle qualified by reason of the extent of its membership to be authorized under NIRA to submit a Code of Fair Competition for the cement industry.

(w) The Commission erred in subparagraph (p) in failing to find that the "Washington Contract Committee", referred to in said paragraph was operating for the purpose of participating in the then proposed public hearing to be held by NRA in connection with the adoption of a Code of Fair Competition under NRA for the cement industry.

(x) The finding in subparagraph (p) that the "multiple basing-point delivered-price system" was continued in full operation during the NRA Code period is not supported by the evidence, and the Commission erred further in failing to find the material facts concerning the differing methods of pricing and different kinds of prices used and filed by petitioners and other members of the industry under the NRA.

(y) The Commission erred in subparagraph (q) in failing to find the material fact that the Articles of Association of the Institute were amended to include the provision regarding the adoption and promulgation of a Code of Fair Competition in June, 1933 when it was known that the Institute was a proper vehicle for the submission of such a Code to the NRA and that this provision was continued in the Articles of Association of the Institute after the *Schechter* decision only until it became apparent that some new legislation authorizing government supervised Codes of Fair Competition would not be forthcoming.

(z) The Commission erred in subparagraph (q) in failing to find that neither the sales contract form nor any of the provisions thereof was adopted or used by any of the petitioners subsequent to the issuance of the Compendium.

(aa) The finding in subparagraph (r) relating to the alleged maintenance of the "multiple basing-point delivered-price system" and alleged "resistance" to selling f.o.b. mill is not supported by the evidence.

(bb) The finding in subparagraph (r) regarding f.o.b. mill bids to agencies of state and federal governments is not supported by the evidence and the Commission erred further in failing to find the material fact that sales at f.o.b. mill prices were made to government agencies in nearly every case where requested.

(cc) The finding in subparagraph (r) that "the industry did not comply with the request of the President" is an unwarranted interpretation of and is not supported by the evidence.

18. With respect to Paragraph Eight:

(a) The finding in subparagraph (a) in so far as it refers to the use of a "pricing formula" and infers that such "formula" causes identical prices is not supported by the evidence.

(b) The Commission erred in subparagraph (a) in failing to find the material fact that accurate determination of freight rates can give only one result whether such determination be independent or otherwise.

(c) The finding in subparagraph (b) that the purpose of disseminating freight rate information was to avoid quoting different delivered prices is not supported by the evidence.

(d) The finding in subparagraph (b) in so far as they fail to specify what were the "various regional associations" and "other organizations" referred to are so vague and inadequate as not to constitute findings upon which the Order herein may be based.

(e) The Commission erred in subparagraph (c) in failing to find the material fact that the Institute has never published or distributed rate books for the States of Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington or Wyoming and that it published them for only a relatively short period in Texas and New Mexico.

(f) The Commission erred in subparagraph (c) in failing to find the material fact that the freight rates shown in the rate books are the true rates compiled from the official tariffs and that they are given from every point where any cement originates to all destinations in the states for which they are published.

(g) The findings in subparagraph (d) that the Institute rate books were intended and used to provide common freight rate factors for pricing, to avoid differences in delivered price quotations, to enable respondents to quote identical delivered prices, and that they were in fact used for that purpose, are not supported by the evidence, and the Commission erred further in failing to find the material fact that the only purpose of the rate books was to provide accurate freight rate information in convenient and quickly

usable form at low cost and that the rate books were in fact used, by those petitioners that used them, for a variety of purposes.

(h) The findings in subparagraph (d) that Institute rate books, were "frequently" furnished to salesmen and the inference that all respondents used Institute rate books, or that all respondents who did use them furnished them to their salesmen, is not supported by the evidence.

(i) The finding in subparagraph (e) that there is an "Institute formula" regarding the conversion of freight rates and that the result of using a conversion table is different from that arrived at by the railroads is not supported by the evidence.

(j) The finding in subparagraph (e) that the same method of conversion into rates per barrel has been continued is not supported by the evidence and the Commission erred further in failing to make any findings as to the material facts showing the preparation and use of conversion tables by individual respondents long prior to the issuance of freight rate books by the Institute and as to the continued use of such and other tables by individual respondents.

(k) The finding in subparagraph (e) with respect to the information supplied by a "genuine rate service" is not supported by the evidence and the Commission erred further in failing to make any findings as to the material facts relating to routing, minimum car weights and switching charges.

(l) The finding in subparagraph (f) that the rate books do not include rates from all producing points is not supported by the evidence.

(m) The Commission erred in subparagraph (f) in failing to find the material fact that in each case where the freight rate books showed a rate from a port, the port in question was a port of entry for imported cement and a point from which shipments of imported cement originated.

(n) The finding in subparagraph (g) that Institute rate books have regularly been used for pricing purposes by most of the corporate respondents located in territory covered by the rate books is not supported by the evidence, and the Commission erred further in failing to make any findings of the material facts as to which petitioners subscribed to the Institute freight rate service, which petitioners used the Institute rate books for any purpose, and

which of the petitioners allegedly used them for "pricing purposes".

(o) The finding in subparagraph (g) that "an artificial freight rate factor" is included, is not supported by the evidence.

(p) The finding in subparagraph (g) that all rail freight rates have been used regularly in determining delivered prices even though shipment was made by water transportation or by motor truck is not supported by the evidence.

(q) The finding in subparagraph (h) that "respondents extended their cooperative rate dissemination activity to land grant rates for the same purpose found in the findings to have existed with respect to commercial rates" and the implication that all petitioners either sold cement in areas where land grant rates were applicable or used or were interested in the use and application of land grant rates, are not supported by the evidence.

(r) The findings in subparagraph (h) that land grant rates are not available to any of the corporate respondents; that the purpose of such dissemination of land grant rates as did occur was a means of attaining and maintaing identical delivered prices; and that respondents had an interest in "common freight factors", are not supported by the evidence; and the Commission erred further in failing to make any findings based upon the abundant evidence showing the sources available to interested cement shippers for obtaining applicable land grant rates.

(s) The Commission erred in subparagraph (i) in failing to find the material fact that all purchasers of cement, including government purchasing agents buy solely on the basis of the laid down cost at destination whether the price quoted by the seller or asked by the purchaser is an f.o.b. mill price or a delivered price or whether the sale is made in either of those ways.

(t) The finding in subparagraph (i) that "respondents ordinarily determined the delivered price to be bid according to the formula of lowest combination of base price plus freight which produced identical delivered prices" is not supported by the evidence.

(u) The finding in subparagraph (i) in so far as it implies the interchange of land grant rate information among the several petitioners and implies that land grant rates applicable on a given shipment are not available to

interested cement shippers in advance, is not supported by the evidence.

(v) The finding in subparagraph (i) in so far as it implies that any of the petitioners concerned in the same bid had understandings and agreements as to the rates to be used or the price to be bid is not supported by the evidence.

(w) The finding in subparagraph (j) in so far as it indicates that there was no proper authority for the Code Authority to distribute prices filed with it among members of the industry is not supported by the evidence.

(x) The Commission erred in subparagraph (j) in failing to find the material fact that the differences in sales prices which resulted from the practice of government purchasing ficers deducting commercial freights from destination prices bid, constituted violations of the NRA Code, and therefore if permitted would subject the bidder to penalties under the law.

(y) The finding in subparagraph (k) that "respondents" found a means of defeating the deduction by the government of commercial freight in land grant territory and the implication in said subparagraph that what is known as the "control clause" was used by all "respondents" are not supported by the evidence.

(z) The Commission erred in subparagraph (k) in failing to find the following material facts: that the so-called "control clause" was filed with the Code Authority by petitioner Signal Mountain as one of its terms and conditions of sale pursuant to the requirements of the NRA Code for the Cement Industry; that said clause was framed and filed by said petitioner independently and without any understanding, agreement or cooperative action with any other cement company; and that in so far as the clause was subsequently used by any of the other petitioners, such use was their individual, independent action without any understanding or agreement.

(aa) The finding in subparagraph (k) that the Code Authority promoted and furthered the use of the "control clause" and the implication that the "control clause" in government bids was used by a substantial number of petitioners for a substantial period following the decision in the *Schechter* case are not supported by the evidence.

(bb) The implication in subparagraph (l) that "respondents" as a group "developed" the use of the "control clause" is not supported by the evidence.

(cc) The finding in subparagraph (l) that each proposal upon which bids were requested by the Government "involved cooperation among the respondents concerned, which in some instances amounted to agreements" is not supported by the evidence, and the Commission erred further in failing to find the material fact that any cooperative activity referred to occurred during the existence of and pursuant to the NRA Code for the Portland Cement Industry.

(dd) The finding in subparagraph (m) that the collection and dissemination of land grant rates by the Institute was for the purpose of providing "common freight factors on government business" is not supported by the evidence.

(ee) The Commission erred in subparagraph (o) in failing to find that there is not and has never been any connection between petitioners and the Pacific Coast Cement Institute and the Commission erred further in so far as it implied in its findings that any of the activities of the Pacific Coast Cement Institute were unlawful.

19. With respect to Paragraph Nine:

(a) The implication in subparagraph (a) that identical prices at any given delivery point are caused by the use of a "pricing formula" is not supported by the evidence.

(b) The finding in subparagraph (a) that "identical prices are important to respondents" is not supported by the evidence, and the Commission erred further in subparagraph (a) in failing to find that each of the petitioners is interested solely in meeting the lowest price of any competitor at the place of delivery, and that the reason why a difference in price of 1¢ per barrel will deflect the sale from one seller to another is that no buyer will pay 1¢ more for one brand of cement than for another.

(c) The finding in subparagraph (a) to the extent that it implies the use of a "pricing formula" by petitioners is not supported by the evidence, and the Commission erred further in failing to make any findings of the material facts as to the extent of price identity and explaining the identity of cement prices at a given time and place and the numerous factors which may contribute to this identity.

(d) The implication in subparagraphs (b) and (c) that the identity of delivered price in sealed bids to public agencies and in bids submitted to State agencies is the result of the use of a "pricing formula" is not supported by the evidence; and the Commission erred further in fail-

ing to make any finding of the material facts shown by the voluminous evidence adduced by and on behalf of petitioners in explanation of their method of determining their individual prices on each of the bids referred to in said subparagraphs (b) and (c) and the reasons for the general identity of such prices.

(e) The Commission erred in subparagraph (d) in failing to find that none of the following fifty-six petitioners ever withdrew or corrected a bid or sought to withdraw or correct a bid:

Alpha
Arkansas
Ash Grove
Bessemer
Colorado
Consolidated
Coplay
Cumberland
Dewey
Diamond
Edison
Federal
Florida
Georgia
Giant
Glens Falls
Great Lakes
Green Bag Pa.
Green Bag W. Va.
Hawkeye
Hercules
Hermitage
Idaho
Keystone
Kosmos
Lawrence
Lehigh
Medusa
Missouri
Monarch
National
Nazareth
Nebraska
North American
Northwestern States
Oklahoma
Oregon
Peerless
Petoskey
Pittsburgh
Signal Mountain
Southern States
Southwestern
Standard
Superior
Three Forks
Trinity
Union
Utah
Valley Forge
Volunteer
Vulcanite
Wabash
West Penn
Whitehall
Wolverine

and the finding in subparagraph (d) that bids were corrected, withdrawn or sought to be corrected or withdrawn, when they were lower than the "basing point pattern" is not supported by the evidence and the Commission further erred in failing to find the reasons why in some rare instances individual petitioners bid higher than bids generally submitted.

(f) The findings in subparagraph (e) to the extent that they imply that "delivered prices" were the only type of prices filed by petitioners or disseminated under the NRA Code; that there was any filing, exchange or dissemination of base prices, or that petitioners have used or employed a "multiple basing-point delivered-price system," are not supported by the evidence; and the Commission erred further in failing to make any findings regarding the material evidence showing that f.o.b. mill prices were filed and disseminated under the NRA Code, and regarding the nature, operation and the exact methods pursued by the Code Authority and petitioners in connection with the operation of open price filing under the NRA Code.

20. With respect to Paragraph Ten:

(a) The implication in subparagraph (a) that there is a "pricing system" in use among petitioners is not supported by the evidence.

(b) The findings in subparagraph (a) are not supported by the evidence.

(c) The implications and inferences in subparagraphs (b), (c), (d), (f) and (g) that the so-called imposition of punitive bases described in those subparagraphs was the result of agreement or collusion or that it was because of price cutting or spotty competition are not supported by the evidence and the Commission further erred in failing to find the facts and circumstances surrounding the incidents described and that the so-called imposition of punitive bases were normal competitive acts done by certain respondents in an effort to meet competition in the markets and were done without any understanding or agreement with any competitors.

(d) The finding in subparagraph (e) that there was much activity among respondents for the purpose of restoring price stability and to remove involuntary bases in so far as it implies any agreement or understanding among petitioners or any of them is not supported by the evidence.

(e) The finding in subparagraph (e) that references to the evidence set forth therein are illustrative of activity of respondents to restore price stability is not supported by the evidence.

(f) The finding in subparagraph (h) in so far as it implies the use by petitioners of a "multiple basing-point delivered-price formula" and that there was any agree-

ment or understanding among petitioners with respect to "the compelling force" of so-called "punitive" bases is not supported by the evidence and the commission further erred in failing to find that the suggestion made by the president of Kosmos set forth in subparagraph (h) was never acted upon by any respondent.

(g) The findings in subparagraph (i) in so far as they imply any agreement or understanding among the petitioners with respect to the sales policies of the petitioner Aetna are not supported by the evidence; and the Commission erred further in failing to find the material fact that Messrs. Cree and Lingeman referred to in said subparagraph (i) were discharged by the president of their company because of their inability to operate the company profitably and in accordance with the orders of the president.

21. With respect to Paragraph Eleven:

(a) The implication in subparagraph (a) that petitioners are employing a method of maintaining uniform delivered prices by means of the "multiple basing point system" and the use of common freight rate factors is not supported by the evidence.

(b) The finding in subparagraph (b) that the "respondents through cooperation, understandings and agreements among themselves and with other interested groups" took active steps to eliminate, discourage and control trucking of cement and the implication that petitioners use or employ a "delivered price system" are not supported by the evidence.

(c) The Commission erred in subparagraph (b) in failing to find that there was no uniformity of attitude among petitioners with respect to the use of trucks for the delivery of cement; that a number of petitioners never abandoned the practice of delivering to trucks at the mill; that the determination of the respective petitioners to eliminate delivery to trucks at the mill came about through their independent determination and action at different times in different places depending upon the existing competitive situation; that the controlling considerations of those petitioners who did abandon delivery to trucks differed; and that the attitude of the most important customers—the dealers—was in most cases the most important consideration.

(d) The Commission erred in subparagraph (c) in fail-

ing to find that the following thirty-four petitioners never made a 15¢ or other charge for delivery of cement to trucks at their mill:

Arkansas	Oklahoma
Bessemer	Oregon
Cumberland	Peerless
Dewey	Petoskey
Federal	Pittsburgh
Florida	Signal Mountain
Georgia	Standard
Great Lakes	Southern States
Green Bag W. Va.	Three Forks
Green Bag Pa.	Trinity
Hawkeye	Union
Hermitage	Utah
Idaho	Valley Forge
Kosmos	Volunteer
Missouri	Vulcanite
National	Wolverine
Northwestern States	Whitehall

and the Commission erred further in failing to find that those petitioners who made an extra charge for delivery to trucks at the mill did so independently and without any understanding or agreement with competitors.

(e) The implication in subparagraphs (d) (e) and (f) that petitioners by understanding or agreement sponsored or adopted plans for discouraging or controlling trucking is not supported by the evidence.

(f) The Commission erred in subparagraph (e) in failing to find that the Institute did not participate in any of the matters referred to therein.

22. With respect to Paragraph Twelve:

(a) The implication in subparagraph (a) that petitioners employed a "multiple basing-point delivered-price system" and that this is directed toward the maintenance of uniform prices for cement is not supported by the evidence.

(b) The finding in subparagraph (a) in so far as it implies that petitioners had any understanding or agreement to prevent diversions of cement in transit is not supported by the evidence.

(c) The Commission erred in subparagraph (a) in failing to find that a purchaser who diverts cement ordinarily obtains a lower price than other purchasers similarly situated.

(d) The implication in subparagraph (b) that the Code of Ethics of the Institute was adopted or used as a guide in determining sales practices or policies by petitioners is not supported by the evidence; and the Commission erred further in failing to find that the following twenty-six petitioners never adopted or pursued any specific policy with respect to preventing the diversion of their cement in transit:

Arkansas	Oklahoma
Consolidated	Oregon
Diamond	Peerless
Edison	Pittsburgh
Florida	Signal Mountain
Georgia	Standard
Giant	Three Forks
Glens Falls	Trinity
Great Lakes	Union
Green Bag Pa.	Utah
Idaho	Valley Forge
Keystone	Vulcanite
North American	Wabash

(e) The finding in subparagraph (b) that the Compendium of Established Terms and Marketing Methods was approved by the trustees of the Institute is not supported by the evidence.

(f) The Commission erred in subparagraph (c) in failing to find which of the petitioners were connected with the matters referred to therein.

(g) The Commission erred in subparagraph (d) in failing to find which of the corporate respondents' traffic representatives participated in the activities referred to therein, and further in failing to find that the following thirty-eight petitioners never used the bill of lading stamp referred to in said subparagraph (d):

Aetna	Glens Falls
Arkansas	Great Lakes
Bessemer	Green Bag Pa.
Consolidated	Hercules
Cumberland	Idaho
Diamond	Keystone
Edison	Missouri
Florida	Nebraska
Georgia	North American
Giant	Northwestern States

Oklahoma	Union
Oregon	Utah
Peerless	Valley Forge
Pittsburgh	Volunteer
Signal Mountain	Vulcanite
Southern States	Wabash
Standard	West Penn
Three Forks	Whitehall
Trinity	Wolverine

(h) The finding in subparagraph (e) in so far as it implies any agreement or understanding among petitioners regarding pre-payment of freight charges is not supported by the evidence; and the Commission erred further in failing to find which of the petitioners, if any, were connected with any of the matters referred to in said subparagraph (e).

23. With respect to Paragraph Thirteen:

(a) The finding in subparagraph (a) that petitioners had taken collective action to effect the cancellation of duplicated contracts is not supported by the evidence; and the Commission erred further in failing to find that the contract reporting service to the extent it was availed of was solely for the purpose of preventing frauds upon cement sellers and which of the petitioners participated in the contract reporting and checking service of the Institute and the facts and circumstances surrounding the action taken by individual petitioners in the cancellation of duplicated and excessive specific job contracts.

(b) The Commission erred in subparagraph (a) in failing to find that the action of purchasers in contracting for or taking more cement than is needed for a specific job constitutes a fraud on the seller.

(c) The implication in subparagraph (a) that petitioners use or employ a "multiple basing-point formula" or that the matters referred to therein were connected with or related in any way to any particular method of selling or to the use of delivered prices are not supported by the evidence.

(d) The finding in subparagraphs (e) and (f) that the cancellation of excessive and duplicated contracts was not left to the independent judgment of the individual members and that collective action and the pressure of collective

opinion were brought to bear to induce the cancellation of contracts is not supported by the evidence.

(e) The Commission erred in subparagraph (f) in failing to find that the contract reporting and checking service of The Cement Institute was discontinued in September, 1936.

(f) The conclusion in subparagraph (g) with respect to the purpose of the letter written on behalf of the Institute referred to therein is not supported by the evidence.

24. With respect to Paragraph Fourteen:

(a) The findings in subparagraph (a) that the respondents employed a "multiple basing point delivered price system", that this has been "supplemented" by collective action with respect to uniformity of terms and conditions of sale, that the Institute has "carried forward, supported and supplemented" such uniformity, and that there has been a "process of standardizing" terms and conditions of sale are not supported by the evidence and the Commission erred further in failing to find that the terms and conditions of sale of petitioners vary not only in different marketing areas, but also in the same market and that such uniformity as exists is brought about by active competition.

(b) The Commission erred in subparagraph (b) in implying the connection of all petitioners with the matters referred to therein, and further in failing to find with respect to the several meetings of the Association of Portland Cement Manufacturers mentioned, that sixty-five of the petitioners were not members at the time, nor in attendance at the meeting of September and sixty-two were not members nor did not attend the meeting of December 1905; that sixty-four of the petitioners were not members at the time nor in attendance at the meeting of March 1906; that fifty-four of the petitioners were not members at the time, nor in attendance at the meeting of September 1915, as follows:

September 1905:

Sixty-five petitioners were not members or did not attend this meeting as set forth in Assignment No. 17(l).

December 1905:

The thirty-eight petitioners, as set forth in Assignment No. 15(a) and the following eighteen petitioners with six

co-petitioners were not members or did not attend this meeting.

Ash Grove	Peerless
Colorado	*Riverside*[4]
Dewey	Santa Cruz[1]
Diamond	*Southwestern*
Giant	*Superior*
Huron[2]	*Superior Inc.*[3]
Kosmos	*Three Forks*
Monarch	*Trinity*
Missouri	*Union*
Northwestern States	*Universal*[5]
Oklahoma	*Utah*
Pacific[1]	Wabash

and that, in fact, sixteen of these petitioners (italicized) were not in existence in 1905.

March 1906:

The thirty-eight petitioners, as set forth in Assignment No. 15(a) and the twenty-four petitioners mentioned above with the following two additional petitioners were not members or did not attend this meeting:

Glens Falls	Wolverine

September 1915:

The thirty-eight petitioners, as set forth in Assignment No. 15(a) and the following twelve petitioners with four co-petitioners were not members or did not attend this meeting.

Coplay	Riverside[4]
Dewey	Santa Cruz[1]
Medusa	Superior Inc.[3]
Monarch	Trinity
Nazareth	Utah
Northwestern States	Wabash
Oklahoma	Whitehall
Pacific[1]	Wolverine

(c) The finding in subparagraph (c) that the Portland Cement Association in 1919 was "largely composed of re-

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8373.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8393.
[5] Petitioner in Case No. 8399.

spondents herein" is not supported by the evidence; and the Commission erred further in failing to find that the following twenty-three petitioners and six co petitioners, or a total of twenty-nine, were not in existence in 1919:

Arkansas
Bessemer
Calaveras[2]
Consolidated
Cumberland
Federal
Florida
Great Lakes
Georgia
Green Bag Pa.
Green Bag W. Va.
Hermitage
Idaho
Keystone
Lone Star
Monolith[7]
Monolith Midwest[7]
National
North American
Northwestern[4]
Penn-Dixie
Pittsburgh
Signal Mountain
Spokane[2]
Standard
Valley Forge
Volunteer
West Penn
Yosemite[2]

And that there is no evidence that the following twenty-four petitioners and five co-petitioners, or a total of twenty-nine, were or were not members of the Portland Cement Association in 1919:

Aetna
Beaver[2]
California[6]
Coplay
Diamond
Edison
Hawkeye
Hercules
Kosmos
Marquette[1]
Medusa
Monarch
Nazareth
Nebraska
Oklahoma
Oregon
Petoskey
Riverside[5]
Southern States
Southwestern
Superior
Superior Inc.[3]
Three Forks
Trinity
Union
Utah
Wabash
Whitehall
Wolverine

[1] Petitioner in Case No. 8371.
[2] Petitioner in Case No. 8372.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8389.
[5] Petitioner in Case No. 8393.
[6] Petitioner in Case No. 8402.
[7] Petitioner in Case No. 8409.

(d) The implications in subparagraph (d) that the Institute had any part in creating or maintaining uniformity of terms and conditions of sale among the corporate respondents and that the Code of Ethics contained "prohibitions" are not supported by the evidence.

(e) The implication in subparagraph (e) that all petitioners followed or adopted the action of the Lehigh company referred to therein is not supported by the evidence and the Commission erred further in failing to find that the following thirty-six petitioners did not follow the action of the Lehigh company referred to in said subparagraph:

Aetna
Arkansas
Ash Grove
Colorado
Consolidated
Cumberland
Dewey
Federal
Florida
Great Lakes
Green Bag Pa.
Green Bag W. Va.
Hawkeye
Idaho
Kosmos
Lone Star
Missouri
Monarch
Nebraska
Northwestern States
Oklahoma
Oregon
Peerless
Signal Mountain
Southern States
Standard
Superior
Three Forks
Trinity
Union
Utah
Valley Forge
Volunteer
Wabash
West Penn
Whitehall
Wolverine

(f) The finding in subparagraph (e) that "leaders of the cement industry met and discussed the situation" is not supported by the evidence and is further so vague, inadequate and misleading as not to constitute a finding upon which the Order herein may be based.

25. With respect to Paragraph Fifteen:

(a) The purported findings in subparagraph (a) that a "theory of dividing available business" among petitioners "in accordance with some pre-determined formula" was developed among respondents, and that petitioners have engaged in activities for the "inculcation of a philosophy of maintaining a static condition in the production of cement" and the implication that petitioners have engaged in any understanding or agreement to maintain a

price level are not supported by the evidence; and the Commission erred further in failing to make any finding as to which of the petitioners are referred to by the phrase "some of the respondents."

(b) The finding in subparagraph (b) that the meeting of the Association of American Portland Cement Manufacturers in September 1903 was attended by representatives of a number of the "respondents" is so vague and indefinite as not to constitute a finding upon which the Order herein may be based; and the Commission erred further in failing to find that only three petitioners were represented at the meeting of March 1904 referred to in said subparagraph; and that the thirty-eight petitioners, as set forth in Assignment No. 15(a) and the following twenty-two petitioners with eight co-petitioners, or sixty-eight petitioners, were not members or did not attend the meeting of September 1903 referred to:

Alpha	*Oklahoma*
Ash Grove	Pacific[2]
Colorado	*Riverside*[5]
Dewey	*Santa Cruz*[2]
Diamond	*Southwestern*
Edison	*Superior*
Giant	*Superior Inc.*[4]
Glens Falls	*Three Forks*
Huron[3]	*Trinity*
Kosmos	*Union*
Lehigh	*Universal*[6]
Marquette[1]	*Utah*
Missouri	Wabash
Monarch	Whitehall
Northwestern States	Wolverine

and that in fact eighteen of these petitioners were not in existence in 1903.

The fifty-six petitioners who were not members or did not attend the meeting of June 1910 are set forth in Assignment No. 17(n).

The thirty-eight petitioners, as set forth in Assignment

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[1] Petitioner in Case No. 8371.
[2] Petitioner in Case No. 8372.
[3] Petitioner in Case No. 8373.
[4] Petitioner in Case No. 8386.
[5] Petitioner in Case No. 8393.
[6] Petitioner in Case No. 8399.

No. 15(a), and the following seventeen petitioners with five co-petitioners, or a total of sixty petitioners, were not members nor did they attend the meeting of June 1911:

Alpha	Peerless
Coplay	Riverside[4]
Diamond	Santa Cruz[1]
Giant	Southwestern
Glens Falls	Superior
Huron[2]	Superior Inc.[3]
Kosmos	Three Forks
Lehigh	Trinity
Medusa	Union
Nazareth	Whitehall
Pacific[1]	Wolverine

(c) The Commission erred in subparagraph (b) in that its reference to the minutes of the meeting of June, 1910 is incomplete and misleading and the Commission erred further in failing to make any finding as to which of the petitioners are referred to by the phrase "representatives of a number of respondents herein" which occurs four times in subparagraph (b) and in failing to make any finding with respect to the material evidence explaining and clarifying the several matters referred to in subparagraph (b).

(d) The finding in subparagraph (c) that the statistical service of The Cement Institute was designed to aid in controlling production is not supported by the evidence and the Commission further erred in failing to find as to the true scope and purpose of the Institute statistical service and as to the service provided prior thereto by W. S. Mallory.

(e) The Commission erred in subparagraph (d) in failing to make any finding with respect to the material evidence explaining and clarifying the several matters referred to in the excerpts of the evidence set forth in said subparagraph (d) without which material finding said excerpts are so incomplete and misleading as not to provide any proper basis for the Order herein.

(f) The Commission erred in subparagraph (e) in failing to find that individual production figures in District 7 during the period mentioned therein varied from 56.7% to

[1] Petitioner in Case No. 8372.
[2] Petitioner in Case No. 8373.
[3] Petitioner in Case No. 8386.
[4] Petitioner in Case No. 8393.

96.7%; in District 8 from 52.4% to 87% and in District 3 from 39.7% to 104.7%; and the Commission erred further in failing to find that the rate of production of the respective petitioners has varied considerably from time to time and that it has not at any time been caused by or resulted from any understanding or agreement among them with respect to the amount or the rate of their production.

(g) The Commission erred in subparagraphs (g) and (h) in failing to find that no plan or method for sharing business among petitioners ever existed.

(h) The Commission erred in subparagraph (h) in failing to find that a variation of 100th of 1% in the percentage figures of shipments shown by the tabulation in said subparagraph (h) represented over 2,500 barrels of cement and that the variations in actual shipments there referred to from year to year was as high as 330,000 barrels for a given company.

(i) The conclusion in subparagraph (j) that the dissemination of statistical information resulted in a substantial restraint upon the price, production and sales policies of the respondents is not supported by the evidence.

(j) The finding in subparagraph (j) that the statistical service of the Institute resulted in substantial restraint upon the price, production and sales policies of petitioners and tended to substitute collective opinion for individual judgment with respect to production of the individual companies is not supported by the evidence.

26. With respect to Paragraph Sixteen:

(a) The implication in subparagraph (a) that there was any cooperation among petitioners to prevent increases in production which might interfere with price stability beyond that requested by the President of the United States and authorized by the NRA Code for the Cement Industry is not supported by the evidence.

(b) The Commission erred in subparagraph (d) in failing to find that the material furnished by the Portland Cement Association to the Reconstruction Finance Corporation was furnished at the request of the Reconstruction Finance Corporation.

(c) The finding in subparagraph (e) that there was a cooperative plan of opposition through the Institute and otherwise to prevent a loan by the Reconstruction Finance Corporation for a cement plant at Orofino, Idaho, and that

"respondents" were engaged in such plan is not supported by the evidence.

(d) The Commission erred in subparagraphs (c), (d), (e) and (f) in that the excerpts from the evidence referred to therein are so incomplete, vague and misleading as not to constitute a proper basis for any findings upon which the Order herein may be based.

27. With respect to Paragraph Seventeen:

(a) The finding in subparagraph (a) in so far as it implies that petitioners had agreements and understandings with respect to dealer policies among themselves and with groups of dealers and dealer organizations is not supported by the evidence.

(b) The findings in subparagraph (b) in so far as they imply agreement or understanding among the petitioners with respect to "other matters" and to the effect that the Institute has continued, adopted and supplemented previous concerted action are not supported by the evidence.

(c) The Commission erred in subparagraph (b) in failing to find that the following thirty-two petitioners never adopted or published a definition of a dealer:

Aetna	Keystone
Arkansas	Missouri
Ash Grove	North American
Bessemer	Oklahoma
Colorado	Peerless
Coplay	Petoskey
Cumberland	Pittsburgh
Dewey	Signal Mountain
Glens Falls	Southern States
Giant	Standard
Georgia	Utah
Great Lakes	Three Forks
Green Bag Pa.	Valley Forge
Green Bag W. Va.	Vulcanite
Hawkeye	West Penn
Idaho	Whitehall

and the Commission erred further in failing to find that the thirty-eight petitioners, as set forth in Assignment No. 15(a) and the following two additional petitioners or a total of forty petitioners, were not connected in any way with the Association of American Portland Cement Manufacturers as of 1915 or thereafter:

Coplay	Dewey

(d) The finding in subparagraph (b) that the Portland Cement Association in 1919 was "largely composed of respondents herein" is not supported by the evidence; and the Commission erred further in failing to find that twenty-nine petitioners, as set forth in Assignment No. 24(c), were not in existence in 1919 and the Commission further erred in failing to find that there is no evidence that twenty-nine petitioners, as set forth in Assignment No. 24(c), were or were not members of the Portland Cement Association in 1919.

(e) The Commission erred in subparagraph (c) in failing to find that the purported outline of cement marketing structure referred to therein was an outline of the marketing structure only of petitioner Lehigh and did not purport to outline the marketing practices or policies of any other petitioners.

(f). The finding in subparagraph (d) in so far as it implies that petitioners, or any of them, collectively arrived at any agreements with dealers regarding classification of trade and division of business is not supported by the evidence and the Commission erred further in failing to find that the negotiations and conferences referred to in said subparagraph (d) subsequent to January 24, 1934 related to the reinstatement in the Code of Fair Competition under NRA of some provision regarding dealer policies.

(g) The findings in subparagraph (e) that the dealer policies of "respondents" were the result of agreements among them, and that the practices established were "almost completely uniform" are not supported by the evidence, and the Commission erred further in failing to make any findings with respect to the abundant material evidence showing the factors inherent in the nature of the product which cause the dealer practices and policies of petitioners who are competing in the same markets to tend toward uniformity.

(h) The findings in subparagraph (e) that dealer policies were decided upon at meetings in March and April, 1935 and that the Institute participated in such meetings is not supported by the evidence; and the Commission erred further in failing to make any findings with respect to the material evidence showing the nature of the various meetings referred to in said subparagraph (e), what petitioners were represented at such meetings, what matters were discussed and what the outcome of such meetings was.

(i) The implication in subparagraph (f) that the petitioners participated in agreements or understandings to maintain compliance with announced dealer policies is not supported by the evidence.

28. With respect to Paragraph Eighteen:

(a) The findings in subparagraph (a) in so far as it implies an agreement or concerted action among petitioners with respect to the division of business is not supported by the evidence; and the Commission erred further in failing to find that the policies and practices of the respective petitioners regarding sales to dealers and to the Government were not uniform and in failing to make any finding with respect to the material evidence showing the historical and natural development of the individual policies of the several petitioners regarding sales to dealers and to agencies of the Federal Government.

(b) The finding in subparagraph (b) with respect to the reason for the appointment of a committee to confer with Government purchasing agencies is not supported by the evidence.

(c) The finding in subparagraph (b) that there was an "agreed program for division of business" is not supported by the evidence; and the Commission erred further in failing to find that the meeting referred to with officials of the Procurement Division was held at the request of the Procurement Division.

(d) The Commission erred in subparagraph (c) in imputing to petitioners any responsibility for the matters referred to in the letter of August 28, 1935 quoted in said subparagraph.

29. With respect to Paragraph Nineteen:

(a) The Commission erred in subparagraph (a) in implying that all petitioners were concerned with the question of meeting competition of imported cement; and the Commission erred further in failing to find that the following thirty-three petitioners have never sold their cement in competition with imported cement and have never had any policy or practice with respect thereto:

Aetna	Dewey
Arkansas	Diamond
Ash Grove	Federal
Bessemer	Great Lakes
Colorado	Green Bag W. Va.
Consolidated	Green Bag Pa.

Hawkeye
Idaho
Kosmos
Marquette[1]
Missouri
Monarch
Nebraska
Northwestern States
Oklahoma
Oregon
Peerless
Petoskey
Pittsburgh
Signal Mountain
Standard
Superior
Three Forks
Union
Utah
Valley Forge
Wabash
Wolverine

and the following thirteen petitioners who have sold their cement in competition with foreign cement have never had any fixed policy or practice with respect thereto:

Cumberland
Florida
Georgia
Hermitage
Medusa
National
North American
Southern States
Southwestern
Trinity
Volunteer
West Penn
Whitehall

(b) The findings and inferences in subparagraphs (a) and (b) that there was a "boycott" of dealers who handled imported cement and that respondents maintained a cooperative system of watching in connection with the sale of imported cement in support of the alleged combination to use the "multiple basing-point delivered-price system" are not supported by the evidence.

(c) The implications in subparagraph (a) that petitioners or any of them collectively established "arbitrary" or other prices in areas affected by foreign cement and that at the same time petitioners or any of them collectively maintained higher prices elsewhere under the "multiple basing-point delivered-price system" are not supported by the evidence.

(d) The Commission erred in failing to find that the petitioners named in subparagraph (a) above did not participate in the activities described in subparagraphs (a) and (b) of paragraph 19 of the Findings.

(e) The Commission erred in subparagraph (c) in failing to find that the filing of prices with the Trade Practice Committee continued only for a period of a few months

[1] Petitioner in Case No. 8371.

subsequent to the *Schechter* decision invalidating NRA; that the prices filed were independently determined by the company which filed them; that there was no agreement or understanding among any of the petitioners to use, follow or adhere to any prices which were filed; and that at least the following twelve petitioners stopped filing prices immediately after the *Schechter* decision:

Dewey	States
Edison	Petoskey
Green Bag W. Va.	Volunteer
Hermitage	West Penn
Missouri	Wolverine
National	Whitehall
Northwestern	

30. With respect to Paragraph Twenty:

(a) The finding in subparagraph (a) that the Code of Ethics prohibited the sale of cement except under certain specifications is not supported by the evidence.

(b) The Commission erred in subparagraph (a) in failing to find that the following petitioners were not members at the time nor represented at the meetings of the Association of American Portland Cement Manufacturers and of the Portland Cement Association referred to therein:

AAPCM Meeting, December, 1904: Sixty-one petitioners were not members at the time or represented at the meeting as set forth in Assignment No. 17(l).

AAPCM Meeting, September, 1915: Fifty-four petitioners were not members at that time or represented at the meeting, as set forth in Assignment No. 24(b).

PCA during 1919. The membership during this period is set forth in Assignment No. 24(c).

(c) The implication in subparagraph (a) that the provisions of the Compendium were intended as a guide to be followed or that it was followed by members of the Institute in determining their sales practices and policies is not supported by the evidence.

(d) The Commission erred in subparagraph (b) in failing to find that despite technical variations from minimum specifications all brands of standard Portland cement are homogeneous for all practical purposes.

(e) The finding in subparagraph (c) is not supported by the evidence; and the Commission erred further in failing to find that sixty-one petitioners were not members of

the AAPCM at the time or represented at the meeting referred to in said subparagraph as set forth in Assignment No. 30(b).

(f) The finding in subparagraph (d) that manufacturing representatives have dominated or tended to dominate the Cement Committee of the American Society for Testing Materials is not supported by the evidence.

(g) The finding in subparagraph (d) that there has been considerable opposition to higher requirements in cement specifications is not supported by the evidence.

(h) The implication in subparagraph (g) that cement is not a standard commodity is not supported by the evidence.

(i) The findings in subparagraph (h) are not supported by the evidence.

31. With respect to Paragraph Twenty-One:

(a) The Commission erred in subparagraph (a) in failing to find that the price increases which occurred in some parts of the country in 1932 and 1933 followed a period of price wars during which the price of cement had reached ridiculously low levels; and that each price increase referred to was initiated independently by one company and when followed by all others was followed independently and without agreement or understanding among any of the petitioners.

(b) The findings in subparagraph (a) with respect to "higher prices" and the implication that such prices were inordinately or unreasonably high are not supported by the evidence.

32. With respect to Paragraph Twenty-Two:

(a) The purported summary "in broad outline" of the testimony of petitioners' economic witnesses regarding "the multiple basing point system, uniform delivered prices, and other phenomena of respondents' marketing practices" and the cause thereof is incomplete, inaccurate and not supported by the evidence.

(b) The implication in subparagraph (b) that all of the economic witnesses called by the Commission testified upon the matters set forth in the second sentence of said subparagraph is not supported by the evidence, and the Commission erred further in failing to find that upon certain of the matters referred to only a single witness testified.

(c) The finding in subparagraph (b) that economic witnesses called by the Commission testified regarding

"the basing point system, uniform delivered prices, and various other phenomena of respondents' marketing practices" and as to the conclusions allegedly drawn therefrom are not supported by the evidence.

(d) The findings in subparagraph (c) are not supported by the evidence.

(e) The Commission erred in making any findings based upon the testimony of its economic witnesses in that the hypothetical questions propounded to such witnesses and upon which testimony was based inaccurately described the marketing practices and methods of the several petitioners and were not based upon the evidence.

(f) The Commission erred in paragraph Twenty-two in failing to make findings based upon the abundant material testimony of economic witnesses called by the respondents regarding the phenomena of identical prices, the use of delivered prices, the inherent characteristics of the industry which tend to cause the use of basing points in the determination of prices, the significance of inelastic demand, high overhead costs and freight absorbing sales, price competition, price rigidity, alternative marketing methods and other kindred subjects.

XII. With respect to Paragraph Twenty-Three:

(a) The conclusions in subparagraphs (a) and (b) that there is a "multiple basing point delivered price system" used by the "corporate respondents" and that it is a "discriminatory method of pricing" are not supported by the findings or by the evidence.

(b) The conclusion in subparagraphs (a) and (b) that mill nets received by cement sellers are discriminatory is not supported by the findings or by the evidence.

(c) The finding in subparagraph (c) that there is "much cross-hauling of cement" is not supported by the evidence.

(d) The finding in subparagraph (c) that there is a "reciprocal waiver" of advantages by petitioners in determining their prices in so far as it implies an agreement or understanding among petitioners or any of them regarding prices or pricing methods is not supported by the evidence.

(e) The implication in subparagraph (c) that cement prices are or tend to be unreasonably or unduly high is not supported by the evidence and the Commission erred further in making any findings regarding the level of cement

prices having precluded all proof by petitioners on the subject.

(f) The Commission erred in subparagraph (e) in failing to make any findings with respect to the abundant material evidence showing the reasons why petitioners who sometimes make sales outside the areas immediately tributary to their mills do so, and what factors make this not only possible, but necessary.

(g) The statements, conclusions and implications contained in and suggested by subparagraph (f) are not supported by the evidence or by the findings.

34. With respect to Paragraph Twenty-Four:

(a) The findings, conclusions and implications contained in and suggested by subparagraphs (a), (b) and (c) are not supported by the evidence or by the findings and are contrary to law.

(b) The conclusion in subparagraph (d) that variations in mill nets have not been made in good faith to meet an equally low price of a competitor is not supported by the evidence or by the findings and is contrary to law; and the Commission erred further in failing to find that to conclude that in each instance where respondents have varied their mill nets, such variations were made in good faith to meet varying prices of competitors.

(c) The statements, findings and conclusions in subparagraph (e) are not supported by the evidence or by the findings and are contrary to law.

35. The conclusions and findings in Paragraph Twenty-Five are not supported by the evidence or by the findings and are contrary to law; and the Commission erred further in making its findings and conclusions in the language and terminology of the statute.

36. The conclusions and findings in Paragraph Twenty-Six are not supported by the evidence or by the findings and are contrary to law.

37. The "Conclusion" of the Commission is not supported by the evidence or by the findings and is contrary to law.

38. The Commission erred in accepting, and adopting in substance in its findings, the Trial Examiner's Report upon the Evidence, in overruling the exceptions in writing thereto filed on behalf of petitioners and in failing to make

findings of the material facts set forth in said exceptions, in that:

(a) the Trial Examiner in reporting the evidence to the Commission selected the issues and subjects upon which to report evidence and upon which findings were to be made by the Commission and weighed the evidence for the purpose of selecting the subjects and evidence to be reported;

(b) many of the statements in the Trial Examiner's Report were conclusions founded in most cases on only a small portion of the evidence, misconception of the evidence or no evidence and did not constitute a "Report upon the Evidence";

(c) the Trial Examiner failed to report large quantities of direct and uncontradicted evidence in support of the respective defenses of petitioners and evidence which met, explained, contradicted and otherwise related to evidence presented by the Commission;

(d) the Trial Examiner failed to report the evidence specifically as to each respondent on each of the issues raised by the pleadings and neglected to make any report with respect to whether or not each petitioner was connected by the evidence with any of the allegations of the complaint or any of the subjects contained in the report.

III.

The Commission erred in the reception and rejection of evidence, and in other particulars in respect of the proceedings herein, apparent of record:

The trial practices which the Commission adopted have resulted in an unnecessarily copious and misleading record and erroneous findings which obscure the real issues and prejudice the petitioners by reason of the following:

39. The Commission erred in affirming the rulings of the Trial Examiner excluding material evidence offered on behalf of petitioners and their co-respondents below, respecting matters which are the subject of findings made by the Commission more particularly as follows:

(a) Documentary evidence and testimony showing the methods employed by and the independent action of individual petitioners in determining the prices, terms and conditions of sale used by them in sealed bids to public agencies, tabulations of which bids were offered and re-

ceived in evidence on behalf of the Commission as proof of the existence of a combination, conspiracy, understanding and agreement respecting such prices, terms and conditions of sale. Such evidence is referred to particularly in Appendix A, annexed hereto and made a part hereof, Section I.

(b) Documentary evidence of and testimony regarding f. o. b. mill bids and sales by petitioners to rebut the charge (now reflected in the findings, see, e. g. Par. 7[r]) that they have by agreement or understanding refused to quote and sell at f. o. b. mill prices. Such evidence is set out particularly in Appendix A, aforesaid, Section II.

(c) Documentary evidence and testimony to show that all state agencies and in the great majority of cases, all federal agencies consistently desire and invite bids at delivered rather than at f. o. b. mill prices. Such evidence is referred to particularly in Appendix A, aforesaid, Section III.

(d) Documentary evidence and testimony showing the source of information regarding, and the independent action of individual petitioners with respect to, specific decreases and increases in cement prices referred to in evidence offered and received on behalf of the Commission as proof of the existence of a combination, conspiracy, agreement or understanding among petitioners or some of them with respect thereto at the following times:

(1) February, 1930
(2) March, 1931
(3) July, 1932 and March, 1933
(4) July, 1933
(5) September, 1935 and January, 1937
(6) January, 1936
(7) December, 1936
(8) March and April, 1938.

Such evidence is referred to particularly in Appendix A, aforesaid, Section IV.

(e) Documentary evidence and testimony showing the source of information regarding, and the independent action of individual petitioners with respect to, specific changes in marketing practices and policies referred to in evidence offered and received on behalf of the Commission as proof of the existence of a combination, conspiracy, agreement or understanding among petitioners or some of them with respect thereto, as follows:

(1) The "Lehigh" or "dealer service payment plan" (1930-1931).
(2) February, 1935 sales policies.
(3) Prepayment of freight.
(4) Delivery to trucks at the mill.

Such evidence is referred to particularly in Appendix A, aforesaid, Section V.

(f) Documentary evidence and testimony showing costs of producing cement, profits and losses, the relation of costs to volume and other similar data showing the reasonableness and fairness of cement prices, as bearing on the existence of a combination, conspiracy, understanding or agreement among petitioners and to rebut the fragmentary evidence offered and received on behalf of the Commission to create the inference (as charged in the complaint and reflected in the findings) that cement prices have been arbitrary and unreasonable, including the following:

(1) A survey of costs and profits of the petitioners made by Messrs. Price, Waterhouse & Co., based upon examination of petitioners' books and records.

(2) A survey of the reproduction cost of manufacturing facilities of petitioners' plants by Messrs. Ford, Bacon and Davis.

(3) Cost data and an explanation of the negotiations relating to the proposed Tennessee Valley Authority cement plant.

(4) A survey of the comparative cost of cement and other commodities including building materials, tabulation of cement shipments and the relation of costs to volume and marginal returns.

(5) Other less comprehensive data including testimony regarding increases in selling and production costs since 1933; testimony regarding the element of storage costs; testimony regarding the cost of construction of a Government cement plant at Puerto Rico; the extra costs of producing cement for the Tygert River Dam; the effect of increased specifications on costs; the effect of the periods of operation of mills on costs; the submission of company ledgers and profit and loss statements to the State of Illinois; and evidence of losses sustained by particular petitioners.

Such evidence is referred to particularly in Appendix A, aforesaid, Section VI.

(g) Documentary evidence and testimony showing the reasons for the discharge by petitioner Aetna of Harold

Cree, sales manager; and the resignation of Oscar Lingeman, manager. Such evidence is referred to particularly in Appendix A, aforesaid, Section VII.

(h) Documentary evidence and testimony showing the availability to petitioners of land grant rate information furnished by railroads. Such evidence is referred to particularly in Appendix A, aforesaid, Section VIII.

(i) Documentary evidence and testimony relating to evidence offered and introduced on behalf of the Commission regarding acts and practices subsequent to the date of the complaint. Such evidence is referred to particularly in Appendix A, aforesaid, Section IX.

(j) Documentary evidence and testimony showing the distance of cement shipments as bearing upon the amount of alleged freight absorption and cross-hauling. Such evidence is referred to particularly in Appendix A, aforesaid, Section X.

(k) Documentary evidence and testimony regarding location of markets and the freight rate structure as bearing upon the natural development and use of methods of pricing pursued by petitioners. Such evidence is referred to particularly in Appendix A, aforesaid, Section XI.

(l) Documentary evidence and testimony showing actual prices for cement at given times and places as bearing upon the rigidity of cement prices. Such evidence is referred to particularly in Appendix A, aforesaid, Section XII.

(m) Expert testimony by economic witnesses regarding the following:

(1) The harmful effects of lack of self-restraint on the part of each petitioner, individually, in its pricing and marketing methods.

(2) Comparison of the basing point method with alternative methods including an explanation of the economic basis for the development of the basing point method and the benefits therefrom.

(3) The disadvantages and economic dislocation which would attend selling at uniform f. o. b. mill prices.

(4) Normalcy of so called "cross-hauling" and "dumping" and the obstacles to their elimination in the sale of heavy goods.

(5) The absence of any inference of collusion from the observance of a policy against diversions.

(6) The importance of the ratio of net profits to actual investment costs as indicating the existence of competition.

(7) Testimony of additional economists.
Such evidence is referred to particularly in Appendix A, aforesaid, Section XIII.

All of the evidence the exclusion of which is assigned as error in this Assignment No. 39 is also the subject of a motion to adduce additional evidence filed by and on behalf of petitioners concurrently with the filing of this Statement of Points.

40. The Commission erred in affirming the rulings of the Trial Examiner which permitted such latitude in the introduction of evidence by the Commission's attorneys that any and all evidence offered by them, with minor exceptions, was received with no limitation or specification required or furnished as to what issues or against which of the petitioners or their co-respondents below particular items of evidence were received (typical examples of which are more particularly set forth in subsections [a] and [b] of this Assignment No. 40), and in affirming the rulings of the Trial Examiner which, notwithstanding the wholesale rejection of evidence offered by petitioners, permitted wholly incompetent, irrelevant and immaterial evidence to be introduced on behalf of the Commission upon which a substantial part of the "Findings as to the Facts" of the Commission is based (typical examples of which are more particularly set forth in subsections [c] and [d] of this Assignment No. 40).

The result of said errors is a record so copious and extensive—the Commission's direct case consisted of over 22,000 pages of testimony and 28,000 of exhibits, large portions of which testimony and exhibits were, as to each of your petitioners and their co-respondents, clearly incompetent, irrelevant and immaterial and of such character as could not properly support any findings of fact—as to deny to your petitioners opportunity for an adequate defense before the Commission and adequate opportunity for judicial review of the basis for the Commission's findings, conclusion and order:

(a) In response to a blanket subpoena duces tecum each of the respondents below produced thousands of documents from their files. These documents were identified at the time they were produced as coming from the files of the respective companies which produced them at pages 2840 to pages 4644 of the transcript of the record (more particularly stated in Appendix B, Section I, attached hereto

and made a part hereof). Over objections of counsel for petitioners these documents were turned over by the Trial Examiner to counsel for the Commission without any determination by said Examiner as to their relevancy or materiality, and over 10,000 of said documents were subsequently offered and received in evidence on behalf of the Commission over specific and detailed objections as to competency, relevancy and materiality. The following is a typical sample of this procedure which amply illustrates the error assigned in this Paragraph 40:

(1) Eighten groups of exhibits comprising over 5000 documents, were offered and received in evidence without limitation, merely on the basis that they were produced by a respondent pursuant to the aforesaid subpoena duces tecum. The exhibits contained in each of said groups and the transcript references where they were offered in evidence are set forth in Appendix B, aforesaid, Section II.

(2) Extensive and detailed objections were made on behalf of petitioners to each of the eighteen groups, and in addition, specifically to each document in each group. The transcript references to the specific objections are set forth in Appendix B, aforesaid, Section III.

(3) All of said exhibits (except for a few which were withdrawn and which are not included in this assignment of error) thereafter were, in effect, unconditionally received in evidence at the following pages: Tr. 7608, 8482, 8484-94.

(b) The writings of the late John Treanor, formerly an officer of Riverside Cement Company, were offered and received in evidence without limitation notwithstanding the absence of any opportunity to cross-examine Mr. Treanor (who was dead at the time of the trial) and the absence of any foundation for binding any of the petitioners by said writings. Typical of said writings is Com. Ex. 7 A-B; Tr. 97-98; 100-101; 103-104; 106-109; 112-116; 22144. Other writings of said John Treanor also so admitted and the transcript references relating thereto are set forth in Appendix B, aforesaid, Section IV.

(c) Hundreds of documents were offered and received in evidence on behalf of the Commission, consisting of letters and memoranda passing between third parties where the authors of said documents were not only not presented

as witnesses, but in most cases were unidentified, dead or otherwise unavailable. The following exhibits which were admitted, provide a typical sample, amply illustrating the error assigned in this Paragraph 40:

Comm. Exs. 51, 52, 164 X, 386 B-H; the "1043 series", consisting of 46 separate papers, 1050-B; 1062, 1081 W-2a, 1196 F-K, M-R, 1197, 1499, 1500, 1501 A-B, 2203, 2250, 2390, 2401, 2830. (A particularized statement, including the transcript references where each of said exhibits were identified, objected to, and received in evidence, is set forth in Appendix B, aforesaid, Section V).

(d) Unauthenticated and otherwise incompetent evidence in the form of writings which purported to be excerpts from minutes of meetings of the American Association of Portland Cement Manufacturers and the Cement Manufacturers Protective Association covering times between 1903 and 1915 and other unidentified writings allegedly pertaining thereto were improperly received in evidence and relied upon by the Commission in making its findings. Such evidence is referred to particularly in Appendix B, aforesaid, Section VI.

41. The Commission erred in denying motions made severally on behalf of petitioners at the close of the Commission's case to strike and limit particular items of testimony and exhibits. The purpose of such motions was to define the issues prior to the presentation by petitioners of their defense, to advise petitioners as to the particular items of evidence which each of them would be required to meet and defend against in presenting their respective defenses and to eliminate from the great mass of evidence adduced on behalf of the Commission the substantial amount of incompetent, irrelevant and immaterial evidence so that no explanation or defense thereto would be required. The various and extensive grounds for said motions are contained in Respondent's Exhibits 385 to 395 inclusive and at pages 22078 to 22408 of the transcript of testimony.

42. The Commission erred in affirming and adopting as its own the findings and conclusions of the Trial Examiner in his "Report upon the Evidence" notwithstanding said Examiner throughout the hearings before him had displayed and exercised a closed mind, a decided bias in favor of the Commission, and an assumption throughout the course of the hearings that petitioners and their co-

respondents were guilty as to all matters charged in the complaint, as demonstrated more particularly as follows:

(a) The Trial Examiner completely abandoned and ignored rules of evidence in receiving evidence on behalf of the Commission, but strictly applied and stringently misapplied rules of evidence to exclude evidence offered on behalf of petitioners and their co-respondents.

Typical examples, but not an exhaustive collection, of rulings of the Trial Examiner arranged in parallel columns to show rulings in favor of the Commission and rulings against petitioners and their co-respondents before the Commission on the same point are set forth in Appendix C, attached hereto and made a part hereof, Section I.

(b) The Trial Examiner beginning with the second defense witness, persistently and repeatedly compelled a complete offer of proposed proof on behalf of petitioners and their co-respondents before permitting each successive line of evidence to be offered although no similar offers had ever been theretofore required with respect to evidence offered on behalf of the Commission. (Tr. 23749-59; 39220-23; 33840-42; 23961-87; 26225-29; 22734-53; 39188-215; 32047-50; 36845-49; 38059-70; 38228-30; 39523-25; 26565-70; 27958-59; 33755-57; 36110-12; 38104-22; 38288-91; 38916-17; 32061-62; 34202-17).

(c) The Trial Examiner persistently and repeatedly refused to permit exhibits offered on behalf of petitioners and their co-respondents to be marked for identification, although he freely permitted exhibits offered on behalf of the Commission to be so marked, and, when excluding evidence in many cases, refused to permit an offer of proof to be made, although no similar restrictions had been imposed with respect to evidence offered on behalf of the Commission.

Typical examples, but not an exhaustive collection, of rulings of the Trial Examiner arranged in parallel columns to show rulings in favor of the Commission and rulings against the petitioners and their co-respondents before the Commission on this subject are set forth in Appendix C, aforesaid, Section II.

(d) The Trial Examiner applied a dual standard with respect to the reception of evidence on behalf of the Commission and on behalf of petitioners and otherwise preju-

diced petitioners as more particularly set forth in Assignments Nos. 39 and 40 herein.

(e) The Trial Examiner's "Report upon the Evidence" was in no sense a full and complete report to the Commission of the evidence taken at the hearing but was on its face a biased report confined almost entirely to the evidence presented on behalf of the Commission at the hearings, conclusions drawn therefrom and misconceptions of the evidence and said report ignored and failed to report large quantities of direct and uncontradicted evidence, presented on behalf of petitioners.

43. The Commission erred in failing to consider and to make findings of fact as to all of the evidence that is material to all of the issues and in making its purported "Findings as to the Facts" has considered and made its findings based only on a small part of the evidence and has ignored and has made no findings whatsoever based on large quantities of evidence based on direct and uncontradicted evidence in support of the respective defenses of petitioners and their co-respondents below and on evidence which met, explained, contradicted and otherwise related to the evidence presented by the Commission. If the Commission had considered and made findings as to all of the material evidence, as above stated, there would be no basis in fact for the findings as made and for the order entered thereon.

In all of the respects hereinbefore mentioned under this heading III the Commission denied to the petitioners a fair trial and due process of law in violation of the 5th Amendment to the Constitution of the United States.

IV.

The Commission erred in denying the following motions:

44. The Commission erred in denying the motion made by petitioners to set aside the ruling of the Trial Examiner admitting in evidence Commission's Exhibits 1043-A to 5-H inclusive. The particular exhibits admitted in evidence to which this motion was addressed, together with references to the pages of the transcript of testimony at which objections were stated and the grounds therefor, are set forth in Appendix B, Section V aforesaid. These exhibits were

received in evidence at Tr. 5212, 5248 and the Commission entered its order denying petitioners' motion to set aside the ruling of the Trial Examiner on May 10, 1938.

45. The Commission erred in denying motions made severally upon behalf of petitioners to strike and limit particular items of evidence on various and extensive grounds set forth in petitioners' written motions contained in Respondent's Exhibits 385 to 395 inclusive and at pages 22078 to 22408 of the transcript of testimony.

46. The Commission erred in denying the motion made severally upon behalf of petitioners to reinstate in the record with the same force and effect as it had originally, the testimony of petitioners' witness Major Lewis and also the exhibits which were introduced through this witness, all of which was stricken from the record by the Trial Examiner on motion of counsel for the Commission. Petitioners' motion and the grounds therefor appear at pages 35948 to 35971 of the transcript of testimony and the denial thereof by the Trial Examiner at pages 36081-36082.

47. The Commission erred in denying petitioners' respective motions to dismiss the complaint.

Dated: March 17, 1944.

Respectfully submitted,

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Appendix A

Section I

The evidence, the exclusion of which is assigned as error in Assignment 39(a), is as follows:

Pet. Exs. 1861-1866 (Superior); Tr. 29762-66, 29771-72, 29775-79, 29781-87, 29790, 29795-96, 29798; offer of proof, Tr. 29786.

Pet. Ex. 2880 (Pittsburgh); Tr. 37890-92, 37894.

Pet. Ex. 3047 (National); Tr. 39667-69.

Section II

The evidence, the exclusion of which is assigned as error in Assignment 39(b), is as follows:

Pet. Exs. 239, 241-247; Tr. 21416-18, 21901-02, 21904-05.

Pet. Exs. 2829-2834 (Southern States); Tr. 37588-89, 37592-93.

Pet. Exs. 3002-3003 (Southwestern); Tr. 39104, 39106-10.

Pet. Exs. 3165, 3170-3173, 3174-a, b, e-z3, 3175-3176 (Medusa); Tr. 40272-73, 40275-76; offer of proof, Tr. 40282-83.

Pet. Exs. 3659-3660; Tr. 47677-80, 47682-84, 47686-87, 47688-701, 47704; offer of proof, Tr. 47684, 47687.

Section III

The evidence, the exclusion of which is assigned as error in Assignment 39(c), is as follows:

Pet. Exs. 1403-1404 (Keystone); Tr. 27561-67; offer of proof, Tr. 27566-67.

Pet. Exs. 1699-1701 (Southwestern); Tr. 28930-31, 28933-35, 28937-38, 28941-42, 28946; offer of proof, Tr. 28947-49.

Pet. Exs. 1862, 1864, 1868-1869 (Superior); Tr. 29762-66, 29781-83, 29785, 29791-98; offer of proof, Tr. 29786.

Pet. Exs. 2295-2300, 2302-2304 (Bessemer); Tr. 32129-34, 32136-37, 32139-42; offer of proof, Tr. 32142.

Pet. Exs. 2793a, d, i-l (Missouri); Tr. 37167-75; offer of proof, Tr. 37171-72, 37174-75.

Pet. Ex. 3385 (Hawkeye); Tr. 41710-11.

Pet. Exs. 3434-3435 (Monarch); Tr. 42269-76.
Pet. Exs. 3718-3719 (Glens Falls); Tr. 47902-05, 47911.
Testimony (Southern States); Tr. 37580-83; offer of proof, Tr. 37582-83.

Section IV

The evidence, the exclusion of which is assigned as error in Assignment 39(d), is as follows:

(1) *February, 1930.*

Pet. Ex. 2373 (Lone Star); Tr. 33081-87, 33089-90.

(2) *March, 1931.*

Pet. Exs. 2654-2655 (Hermitage); Tr. 36139-42, 36144-45.

(3) *July, 1932 and March, 1933.*

Pet. Exs. 3143-3144, 3146, 3148 (Medusa); Tr. 40209, 40211, 40213, 40216-17; offer of proof, Tr. 40216.
Testimony (Lone Star); Tr. 32825-27; offer of proof, Tr. 32826-27.

(4) *July, 1933.*

Pet. Exs. 1669-1686 (Southwestern); Tr. 28827-32, 28835-37, 28839, 28843-52; offer of proof, Tr. 28847.

(5) *September, 1935 and January, 1937.*

Pet. Exs. 2611-2629 (Wolverine); Tr. 35982-83, 35985.
Pet. Ex. 2863 (Pittsburgh); Tr. 37788-95.
Testimony (Superior); Tr. 29579-82, 48567-68, 48647.
Testimony (Pittsburgh); Tr. 37791-92.

(6) *January, 1936.*

Pet. Exs. 1824-1829 (Southwestern); Tr. 29386-87, 29392-93.

(7) *December, 1936.*

Pet. Exs. 1985-1991 (Aetna); Tr. 30062-64, 30066-67; offer of proof, Tr. 30066-67.

(8) *March-April, 1938.*

Pet. Exs. 3043-3044 (National); Tr. 39601-05, 39607-08, 39610.

Section V

The evidence, the exclusion of which is assigned as error in Assignment 39(e), is as follows:

(1) *The "Lehigh" or "dealer service payment" plan* (Dec. 1930—Jan. 1931).

Pet. Exs. 3023-3031, 3033-3034 (National); Tr. 39517-26.

(2) *February, 1935 sales policies.*

Pet. Ex. 1491 (Nazareth); Tr. 28260-63.
Pet. Ex. 2578 (Edison); Tr. 35753-55.
Pet. Exs. 3108-3110 (Medusa); Tr. 40170-72, 40182, 40185-86.
Testimony (Federal); Tr. 30698-700; offer of proof, Tr. 30700.

(3) *Prepayment of freight.*

Pet. Ex. 3375 (Hawkeye); Tr. 41655-57.
Pet. Ex. 3430 (Monarch); Tr. 42246-47.
xTestimony (Federal); Tr. 30710-11.
Testimony (Southwestern); Tr. 38939-40, 38970-71, 38974-75.
Testimony (National); Tr. 39539-40, 39599-600.
Testimony (Hawkeye); Tr. 41619-20, 41632-34, 41697-98.
Testimony (Monarch); Tr. 42195-96, 42200, 42218.

(4) *Delivery to trucks at the mill.*

Pet. Exs. 2033-2035 (Aetna); Tr. 30137-41.
Pet. Exs. 2558-2561, 2563 (Edison); Tr. 35689-93.
Pet. Ex. 2766 (Kosmos); Tr. 36954-57.
Testimony (Bessemer); Tr. 32286-87; offer of proof, Tr. 32287.
Testimony (Penn-Dixie); Tr. 38152-55, 38217-18.

Section VI

The evidence, the exclusion of which is assigned as error in Assignment 39(f), is as follows:

(1) *Survey of costs and profits of petitioners by Messrs. Price, Waterhouse & Co.*

Testimony (witness Lothrop); Tr. 47462-64, 47470-99, 47504; offer of proof, Tr. 47470-99.

(2) *Survey of reproduction cost of manufacturing facilities of petitioners' plants by Messrs. Ford, Bacon & Davis.*

Testimony (witness Schultz); Tr. 47518-23; offer of proof, Tr. 47519-23.

(3) *Cost data and explanation of negotiations relating to proposed Tennessee Valley Authority Cement Plant.*

Pet. Exs. 2190, 2194-2197, 2201, 2202a-d, 2203-2204 (Volunteer).

Testimony, objections, rulings and colloquy at Tr. 31433-50, 31478-504, 31515-71, 31587-649, 31657-64, 31668-69, 31676-81, 31693-98 (Volunteer).

Motions and rulings on the above exhibits and testimony at Tr. 31510, 32929-36, 32938-39, 32957-65, 33883-87, 33889, 33892-94, 35947-49, 35950-57, 35968, 35970, 36081-83, 38847-51, 39467-70, 40684-85, 41456-58, 48567-68, 48647.

(4) *Comparison of cost of cement and other commodities, including building materials and tabulations of cement shipments showing relation of costs to volume and marginal returns.*

Pet. Exs. 2527-2529 (Universal Atlas Cement Company); Tr. 35312-15, 35318, 35321-27.

Pet. Exs. 3741-3742 (witness Pohling); Tr. 47960-64.

Testimony (witness McCracken); Tr. 36759.

Pet. Ex. 2397 (North American); Tr. 33826-31.

Pet. Ex. 2406 (Peerless); Tr. 34186-91, 34193-95, 34197-98.

(5) *Other data more fully described in Assignment No. 39(f)(5).*

Testimony (Superior); Tr. 29610-11.

Testimony (Federal); Tr. 30486-89.

Testimony (Volunteer); Tr. 31367-73; offer of proof, Tr. 31372-73.

Testimony (Bessemer); Tr. 32322-26, 32328-31; offer of proof, Tr. 32330-31.

Testimony (Volunteer); Tr. 31412-13; offer of proof, Tr. 31412-13.

Testimony (Bessemer); Tr. 32061-62.

Pet. Exs. 1030-1035 (Alpha); Tr. 25645-46, 25651-58.

Testimony (Lawrence); Tr. 8211, 48567, 48647; (North American); Tr. 8266, 48568, 48647; (Lehigh); Tr. 26897,

26901, 48568, 48647; (Superior); Tr. 29559-65, 29575-82, 48568, 48647.

Section VII

The evidence, the exclusion of which is assigned as error in Assignment 39(g), is as follows:

Pet. Exs. 1831-1838, 1841, 1844-1847 (Aetna); Tr. 29422-25, 29428-29, 29439-40, 29442-43, 29447-55, 29458-60, 30175-78, 30197-202, 30204.

Pet. Exs. 1972-1974, 1985-1991 (Aetna); Tr. 29960-61, 29978-79, 29982-85, 30062-64, 30066-67; offer of proof as to Pet. Exs. 1985-1991; Tr. 30066-67.

Testimony (Aetna); Tr. 29422-23, 29429-34.

Section VIII

The evidence, the exclusion of which is assigned as error in Assignment 39(h), is as follows:

Pet. Exs. 2253-2254 (Volunteer); Tr. 31823-27.

Testimony (Southwestern); Tr. 39018-20; offer of proof, Tr. 39019-20.

Section IX

The evidence, the exclusion of which is assigned as error in Assignment 39(i), is as follows:

(1) *f.o.b. mill bids or sales.*

(See Section II above.)

(2) *Requests for delivered prices by States and Federal Government.*

Pet. Exs. 1699-1701 (Southwestern); Tr. 28930-31, 28933-35, 28937-38, 28941-42, 28946; offer of proof, Tr. 28947-49.

Pet. Ex. 3434 (Monarch); Tr. 42269-76.

Pet. Exs. 3718-3719 (Glens Falls); Tr. 47902-05, 47911.

Testimony (Southwestern); Tr. 28949.

(3) *Independent action on prepayment of freight.*

(See Section V above except item marked x.)

(4) *Comparative cost of truck and rail, and rail and water delivery.*

Testimony (Penn-Dixie); Tr. 38152-55, 38217-18.

(5) *Independent action in use of equalization clause on bids to Government.*

Testimony (Lone Star); Tr. 32729-31, 32734-35; offer of proof, Tr. 32735.

Section X

The evidence, the exclusion of which is assigned as error in Assignment 39(j), is as follows:

Pet. Ex. 1421 (Nazareth); Tr. 27980-81, 27985-90.

Pet. Ex. 2062 (Federal); Tr. 30491-94, 30497-98.

Testimony (Nazareth); Tr. 27993-94.

Section XI

The evidence, the exclusion of which is assigned as error in Assignment 39(k), is as follows:

Pet. Ex. 2895 (Penn-Dixie); Tr. 38059-63, 38069-76.

Pet. Exs. 2897-2899 (Penn-Dixie); Tr. 38104-07, 38109-10, 38113-14, 38117-19, 38122-23, 38156, 38275, 38288-91; offer of proof, Tr. 38123.

Pet. Ex. 3562; Tr. 46403-07, 46409-10, 46412-13, 46414-15, 46417-18.

Testimony (Penn-Dixie); Tr. 38074-76, 38123.

Pet. Ex. 2411 (Peerless); Tr. 34260, 34263-66.

Testimony (Peerless); Tr. 34273-75, 34281-85.

Testimony (Southwestern); Tr. 38912; offer of proof, Tr. 38912.

Testimony (Medusa); Tr. 41022-23, 41028-30.

Pet. Ex. 715 (Alpha); Tr. 23801-02, 23805-10; offer of proof, Tr. 23807- 23808-09.

Testimony (Edison); Tr. 35698-700, 35702-05; offer of proof, Tr. 35702-03.

Section XII

The evidence, the exclusion of which is assigned as error in Assignment 39(l), is as follows:

Pet. Ex. 2526 (Universal Atlas Cement Co.); Tr. 35303-04, 35308-11, 35348-49, 35354, 35355-57.

Pet. Exs. 2527-2529 (Universal Atlas Cement Co.); Tr. 35312-15, 35321-27.

Section XIII

The evidence, the exclusion of which is assigned as error in Assignment 39(m), is as follows:

(1) *Harmful effects of lack of self-restraint in pricing and marketing methods.*

Testimony (witness Westerfield); Tr. 45536-38; offer of proof, Tr. 45536-37.

(2) *Comparison of basing point and alternative marketing methods showing the natural development of the basing point method and the benefits therefrom.*

Testimony (witness Vaile); Tr. 44248, 44252, 44254, 44258-63; offer of proof, Tr. 44258-63.

Testimony (witness Westerfield); Tr. 45542-43; offer of proof, Tr. 45543.

(3) *Disadvantages of uniform f.o.b. mill pricing method.*

Testimony (witness Westerfield); Tr. 45608-11; offer of proof, Tr. 45610-11.

Testimony (witness Grether); Tr. 45897, 45899-901; offer of proof, Tr. 45900-01.

(4) *Normalcy of cross-hauling and "dumping" and obstacles preventing their elimination.*

Testimony (witness Westerfield); Tr. 45549-50, 45566-67, 45569; offer of proof, Tr. 45550, 45569.

(5) *General observance of policy against diversions for over 20 years does not signify collusion.*

Testimony (witness Fairchild); Tr. 44690-91; offer of proof, Tr. 44691.

(6) *Importance of ratio of net profits to actual investment costs as indicating existence of competition.*

Testimony (witness Fairchild); Tr. 45451-52; offer of proof, Tr. 45452.

Testimony (witness Westerfield); Tr. 45558-60; offer of proof, Tr. 45559.

(7) *Testimony of additional economists in general conformity to the opinions of experts who testified on behalf of petitioners.*

Testimony (witness Cassady); Tr. 46260-64; offer of proof, Tr. 46262-64.

Appendix B.

Section I.

The documents produced by petitioners pursuant to subpoena duces tecum, and the reception of which in evidence is assigned as error in Assignments Nos. 40 and 40(a) herein were produced by the following and identified at the following pages:

Produced by	Comm. Ex. No.	Page Where Identified
The Institute	415	2844
	578	3087
	747	3421
	885	3774
	971	3876
Alpha	731	3416
	809	3670
	867	3768
	868	3768
	942	3865
	956	3869
Colorado	874	3771
	947	3867
Giant	548	2975
	577	3086
	583	3100
	812	3671
	870	3770
	941	3865
	958	3870
Green Bag of Pennsylvania	896	3787
Hermitage	547	2974
	734	3417
	813	3671
	877	3772
Huron	417–419	2879–2881
	421–422	2382–2883
	424–425	2885–2886

Produced by	Comm. Ex. No.	Page Where Identified
Kosmos	817	3672
	962	3870
Lehigh	573–575	3083
	719	3408
	749–750	3423
	751	3423
	826	3676
	828	3676
	829	3676
	831	3677
	832	3677
	834	3678
	835	3678
	836	3679
	837	3679
	839	3679
	844–847	3761
	855	3765
	866	3768
	913	3846
	924–925	3857
	933	3859
	935	3861
Lone Star	585	3100
	740	3420
	879	3773
	919	3850
	963	3871
Medusa	545–546	2972
	819	3673
	964	3871
National	584	3100
	820	3673
Nazareth	551	2977
	821	3673
	882	3773
	950	3868
	966	3871

Produced by	Comm. Ex. No.	Page Where Identified
North American	797	3665
	799	3666
	800	3666
	806	3668
	844–847	3761
	855	3765
	866	3768
	965	3871
Oklahoma	737	3418
	816	3672
	873	3771
Oregon	427	2905
Pacific P.C.	674	3264
Pennsylvania-Dixie	586–587	3101
	822	3673
	883	3774
Riverside	562, 571	3081
Superior, Inc.	640	3236
	643–645	3239, 3240, 3243
Three Forks P.C.	735	3418
Union P.C.	736	3418
	954	3869
Universal-Atlas	553	2986
	576	3085
	730	3413
	886–888	3779–3780
	914	3847
	916	3848
	922	3854
West Penn	549	2976
	823	3673
Blaine S. Smith	937–938	3864
	953	3868
Ideal Cement Company (a non-respondent)	581	3099
	948	3867

Section II.

The exhibits contained in each of the eighteen groups, the admission of which is assigned as error in Assignments Nos. 40 and 40(a) herein, and the pages of the transcript where said exhibits were offered in evidence are as follows:

Group 1		Pages Where Offered in Evidence
Comm. Ex.		
937 ooo-ppp	883 r-t	Tr. 5312-13
937 d-e	883 q	
933 7h-j	883 j-o	
925 8v-w	562 11j-k	
925 4t-z	562 12c-d	
925 5a-c	562 12h-n	
925 5s-t	562 12x-13t	
925 6a-k	562 14h-i	
870 15h-i	562 14v	
562 14r	562 15b-d	
495 a-b	562 9o	
883 2k-n	562 9t-x	
883 y-2h	562 9j	
883 2i	562 10c-e	
883 v		

Group 2		
Comm. Ex.		
740 d	836 2e-f	Tr. 5327-30
958 b-c	836 2b	
829 t	836 1	
836 2u	836 3p-u	
577 y-z	730 h-i	
836 2v-y	836 3m-n	
836 2m-r	576 2o-p	
836 t	553 2x-3e	

Group 2 (Continued)		Pages Where Offered in Evidence
Comm. Ex.		
950 e	440	Tr. 5327-30
950 b	439 a-b	
950 i-j	882 6p-q	
950 p-r	553 3f	
821 4x-z	571 5c-d	
821 5a-b	937 2c-f	
950 f-g	571 t-2b	
950 n-o	571 r-s	
553 x-2c	937 ww-xx	
882 6w-y	562 10q-r	
950 h	578 6r-t	
553 3g	870 15a-c	
571 a-d	870 e	
821 4w	571 11L-12n	
571 5e-f	433	
950 s-u	916 g-j	
Comm. Ex..		
434-437	958 x-y	Tr. 5330-32
571 9k-11k	971 28f-28g	
938 y-z	571 4 L	
958 f-g	971 g-h	
938 2a	958 2p	
553 2n	971 i	
950 x-y	975 k	
953 e	953 w	
958 m-n	975 4i	
958 j, L	971 j	
958 w	571 2y-2z	
971 b-c	953 2r-s	
953 n	971 s-2r	
985 u-v	971 2t-2x	
953 p	971 2z-3a	

Group 2 (Continued		Pages Where Offered in Evidence
Comm. Ex.		
953 2w	956 3v	
971 3b-3c	879 s-u	
953 3g-3j	913 7i	
953 3r	971 4c	
958 2q-2r	971 4h	Tr. 5330-32
941 s	971 4j	
571 3a-3b	913 7b-7c	
971 3j	562 3r-3v	
956 3p-3q	971 4o	
Comm. Ex.		
971 4q-4x	971 9a-9c	
913 6t-6u	971 9h-9i	
971 5a	963 g-q	
971 5c	971 9L-9r	
879 x-y	971 10e	
562 3q	913 6h	
879 w	971 29h	
817 6g-6i	971 31x	
971 5d-5e	971 10L-10n	
879 v	971 10p-10q	
971 5q	971 10v	
966 h-i	971 10x-11d	
966 cc	971 30d-30e	Tr. 5332-35
971 5w-5x	971 30g-30h	
971 6u-6x	971 29e-29g	
971 6z-7a	971 11g	
971 7e-7g	971 30i-30k	
971 7L-7m	971 11L	
965 a-b	971 11n-11o	
962 c-d	963 r	
971 7s-7t	971 11s-11u	
971 7y-8a	971 11y	
971 8n	971 12c	
971 29t-29u	971 12f-12k	

Group 2 (Continued)		Pages Where Offered in Evidence
Comm. Ex.		
971 12m	971 17n-17q	
971 30m-30n	971 17t-17u	
971 13c-13d	971 32c.	
971 30p-30q	971 32n-32s	
971 13h	971 17z-18a	
971 13j-13L	971 18f	
971 13r	971 18i	
963 z	971 18m	
963 2a-2b	971 18x-18z	
958 3c, 3e	956 18p	
971 14k-14L	971 19d	
956 5r	971 19v	Tr. 5335-37
971 14u-14w	971 20k-20m	
971 14z	971 20v	
971 15a-15b	971 20z-21b	
971 15e-15g	958 4a-4i	
958 3i-3k	971 31q	
971 31u	913 4h-4k	
956 14y-14z	971 22x-23b	
971 16a-16c	958 4o-4p	
971 31a	571 2L-2N	
956 15c-15e	913 3q-3r	
562 b-j	571 2o	
971 31v-31w	958 4t-4u.	
Comm. Ex.		
913 3s	971 24e-24i	
913 4a-4e	971 24L-24m	
971 23f-23g	971 24r	
971 23i-23j	958 5c-5d	Tr. 5337-39
971 23n	958 4w	
971 23s-23v	958 4y-4z	
562 3w-3x	958 5a-5b	
971 23w	971 25L-25q	

Group 2 (Continued)		Pages Where Offered in Evidence
Comm. Ex.		
913 2w-2y	971 27k-27n	Tr. 5337-39
882 4v	913 2L-2m	
971 25u-25y	913 2d	
971 26a-26f	419 b	
971 26h-26L	419 h-i	
971 25e	971 28d	
971 32u	971 28h-28o	
971 26r	419 a	
958 5f-5g	964 h	
913 2s-2t	971 28r	
887 4s-4t	971 28t	
958 5j-5p	913 v-w	
888 2L	958 6h	
971 27a-27c	971 y	
971 27e	971 29a-29b	
971 27g-27h	913 d	
Comm. Ex.		
971 29d	971 34p	Tr. 5339
913 a	971 33L-34o	
913 2n		

Group 3

Comm. Ex.		
797 w-z	877 b	Tr. 5340-41
828 6t-7h	947 11f-11g	
847 a-c	947 11m-11n	
846 2o-2p	855 3n	
427 k-t	947 11t	
866 3Z	947 13c	
855 5i		

	Pages Where Offered in Evidence
Group 4	
Comm. Ex. 799 7p 799 6y 799 2L	Tr. 5341
Group 5	
Comm. Ex. 425 c-d; 947 10j-10m; 948 d; 879 ddd; 879 bb; 948 f-j; 879 ww-xx	Tr. 5341-42
Group 6	
Comm. Ex. 417 a-b; 417 d; 417 f-x; 874 hh; 874 L-q; 874 s-t; 813 x-y; 947 9L-9o; 417 y-hh; 571 4w; 947 14e-14g; 947 14y; 417 ii-jj; 947 15e; 418 a-d; 870 13n-13r; 867 u-y; 551 j-3n; 870 13b-13d; 418 e-g; 922 b-ggg	Tr. 5342-44
Group 7	
Comm. Ex. 879 ppp	Tr. 5344
Group 8	
Comm. Ex. 731 12s-12u	Tr. 5345
Group 9	
Comm. Ex. 812 h-i 885 2a	Tr. 5345

		Pages Where Offered in Evidence
Group 10		
Comm. Ex. 844 k-n	576 5h	Tr. 5346
576 4p-4q	576 v-w	
576 p-t		
Group 11		
Comm. Ex. 534 b, e-f, h-j	868 7k	Tr. 5346-47
583 b	586 4L-4n	
Group 12		
Comm. Ex. 644 h	551 a	Tr. 5347
644 k		
Group 13		
Comm. Ex. 415 (572-574)	933 7r	Tr. 5347-48
424 a-i	545 4m-4n	
549 2a-2b	545 4L	
549 y	747 d-e	
896 a-b		
Group 14		
Comm. Ex. 835 z	919 ~~4~~k-l	Tr. 5348-50
734 h	947 9v	
822 c	837 a-L	
947 b-i	562 7k-7L	
947 o	587	
548 3b	919 3e	
919 m-n	885 2q, 2r	
947 9i-9k	585 cc-ee	
947 r-s	831 h-j	

Group 14 (Continued)		Pages Where Offered in Evidence
831 L	947 13a	Tr. 5348-50
947 10c	948 2a-2b	
947 10e	919 3e, 3f	
820 h	885 6s	
919 2i-2L	885 8e	
855 2z	919 3b	
947 13b		

Group 15

Comm. Ex.	427 g	562 6w-6y	Tr. 5350-52
	751 b-e	817 g-k	
	584 g	585 ff-hh	
	749 n	585 kk	
	546 k-q	735 a-b	
	751 i-k	576 5s-5t	
	749 2v	545 6q	
	584 i	933 3c-3d	
	749 a	719 a	
	750 a	845 n	
	750 g	640 a-L	
	422 b-o	422 a	
	546 2i-2j	839 4k	
	933 2s	562 15w-15x	
	933 L-m	954 i-m	
	(Printed matter on back of 954 L is also offered)		
	553 6v	935 b	
	585 a	806 3e-3f	
	800 2u-2x		

Group 16		Pages Where Offered in Evidence
Comm. Ex. 924 5r	415 4i	Tr. 5353-54
573 L	812 s	
415 (27-28)	415 (22)	
574 m-n	553 2L-2m	
500 g-h	942 b-c	
547 4k	954 2h	
553 5z-6a	500 b-c	
Comm. Ex.		
571 4g-h	575 g-i	Tr. 5354
674	562 16f-16g	
575 a-b	562 16j	

Group 17		
Comm. Ex. 549 2e	947 16L-16p	Tr. 5354-59
549 k-v	562 15h-15i	
823 a	645 a-m	
576 6t-6u	914 e	
877 g	549 3g	
585 q-u	731 6g	
834 e	549 2f	
549 2g-2h	549 3e	
549 i-j	549 3a-3c	
549 c	549 2L-2m	
547 h-L	549 3p	
549 f-h	581 f	
549 2c	736 a-c	
879 a-b	919 b-e	
547 a-b	547 f-g	
549 2i	867 7d-7e	
914 f-g	867 7x	
954 u	731 6e-6f	
427 bb-cc	421	

Group 17 (Continued)		Pages Where Offered in Evidence
Comm. Ex.		
549 4n	549 4t	
737 ww	947 10a-10b	
819 bb	919 2w-2z	
643 b-c	549 4u	
870 2b	546 2o-2p	
873 e-g	914 j	
731 4f	415 (49)	
873 m	914 z	
549 4m	415 (50)	
813 v	947 10f	
549 4i	947 10h	
549 4k-4L	947 10y-10z	Tr. 5359-63
886 d	919 2t	
819 aa	546 2k-2L	
819 x	562 7s-7t	
873 i	933 7p-7q	
832 e-g	415 (39-40)	
879 kk	549 5c	
832 c-d	549 4y-4z	
813 bb	867 7h-7i	
415 (373)	933 5d-5e	
867 7v-7w	877 m-n	
816 d	877 i-j	
813 ee	731 4u-4v	
Comm. Ex. 415 (374)	867 7s-7u	
736 d	547 t-v	
734 hh	549 6b	
832 b	415 (366-368)	
874 oo	415 (545)	Tr. 5363-64
547 2c-2d	886 s-t	
547 2i	547 p	
547 y-z	549 5x	
547 2a-2b	547 m	

Group 18		
Comm. Ex. 972 1b-4k	970 a-16n	
(except	974 b-15r	
972 2d-2e)	975 b-20L	Tr. 5321,
973 b-4n	976 a-15n	5325, 5430
967 a-18o	(except	
968 a-18i	976 10g-10q)	
969 b-18a	971 24v	

Section III

General objections to each of the eighteen groups of exhibits, the reception of which is assigned as error in Assignments Nos. 40 and 40(a) herein, and detailed and specific objections to each exhibit in each group were made at the following pages of the transcript:

General objections:

Tr. 5496; 5500-5510; 5557-5559; 5586-5587; 5891.

Specific objections;

Group 1	Tr. 5560-66, 5571-93
Group 2	Tr. 5595-98, 5602-5695
Group 3	Tr. 5696-5703
Group 4	Tr. 5704-06, 5708
Group 5	Tr. 5708-19
Group 6	Tr. 5720-5733
Group 7	Tr. 5735-36
Group 8	Tr. 5737-40
Group 9	Tr. 5741-43, 5747-48, 5750
Group 10	Tr. 5751-56
Group 11	Tr. 5756-61
Group 12	Tr. 5761-63
Group 13	Tr. 5763-66
Group 14	Tr. 5768-77
Group 15	Tr. 5777-5799
Group 16	Tr. 5800-5806
Group 17	Tr. 5807-23, 5825-27, 5829-40, 5844, 5846-74, 5878-83
Group 18	Tr. 5522-23; 55626-27, 5531-46, 5550-56

Section IV

The exhibits, in addition to Comm. Ex. 7 a-b, constituting the writings of the late John Treanor, the reception of which in evidence is assigned as error in Assignments Nos. 40 and 40(b) herein, and the transcript references pertaining to the identification, objections and rulings regarding such exhibits are as follows:

Comm. Ex. No.	Pages Where Identified	Pages Where Objected To	Pages Where Admitted
347 a-i	2024	2027-28	2030-31
350 c, d	2057	2057	2057
351 a-c	2064	2065-66	2066
553 2y	2984-86	5614	8486
553 2z-3e	2984-86	5614	8486
553 2m	2984-86	5803	8490-91
553 3g	2984-86	5617	8486
562 11j-11k	3080-82	5585	8491
562 12c-12d	3080-82	5585-86	8491
562 12L-12m	3080-82	5587-88	8491
562 12n	3080-82	5588	8491
562 14h, 14i	3080-82	5589-90	8491
562 15w-x	3080-82	5796	8494
571 a-d	3080-82	5617	8486
571 k	3080-82	5631	8487
571 4g	3080-82	5805	8491
870 15a, b	3770	5622-23	8486
870 15c-e	3770	5623	8486
870 15h, i	3770	5575-76	8491
913 3s	3846	5681	8488

* This exhibit and all those following were also the subject of further objections appearing at Tr. 5496, 5500-5510, 5557-5559 and 5891, and the general ruling of the Trial Examiner receiving said exhibits in evidence appears at Tr. 8482.

Comm. Ex. No.	Pages Where Identified	Pages Where Objected To	Pages Where Admitted
913 4h-4k	3846	5672a	8488
938 y, z	3862-64	5625	8487
938 2a	3862-64	5625-26	8487
953 e	3868	5626-27	8487
953 n	3868	5628	8487
953 p	3868	5629	8487
953 3g-3j	3868	5634-35	8487
953 3r	3868	5635	8487
958 j-L	3869-70	5627	8487
958 m-n	3869-70	5627	8487
958 u-v	3869-70	5628-29	8487
958 x	3869-70	5629-30	8487
958 y	3869-70	5629-30	8487
958 4a-4i	3869-70	5672	8488
958 4o, 4p	3869-70	5674	8488
958 4t-u	3869-70	5681	8488
971 b, c	3876	5628	8487
971 i	3876	5631	8487
971 5w	3876	5645-46	8487
971 5x	3876	5646	8487
971 22x	3876	5672a-5673	8487
971 22y	3876	5673	8488

Section V.

The exhibits consisting of letters and memoranda passing between third parties not presented as witnesses, the reception of which in evidence is assigned as error in Assignments Nos. 40 and 40(e) herein, together with the transcript references relating to the identification, objections and rulings regarding such exhibits are as follows:

Comm. Ex. No.	Transcript References
51 52	791, 792, 1377, 1380-81
164x	1510, 1511-13, 1514-15
386b-h	2547-49
1043e-f	4634, 4657-59, 10866-67, 20308-09, 22078-85
1043h-i	4635, 4662-63, 10860-65, 22078-85, 22087-88
1043o-r	4635-36, 4666, 4677, 22078-85, 22087-88
1043-s same as 1483	4636, 4677-78, 22078-85, 22087-88
1043t, x, z	4636, 4678-80, 4684, 22078,85, 22087-88
1043-2b, 2d	4636, 4685-86, 4688-89, 22084-85, 22087-88, 22090
1043-2i withdrawn for 1144 1043-2k withdrawn for 1364	4637, 4692-94, 7187-89, 10137, 10141, 20308-09, 22078-85
1043-2L 1043-2m withdrawn for 1143	4637, 4697-99, 7184-87, 7249, 20308-09, 22084-85, 22087-88

	Transcript References	Comm. Ex. No.
1043-2n withdrawn for 1360-a 1043-2o withdrawn for 1360-b	4639, 4699-700, 10123-27, 20308-09, 22087-88	
1043-2p-2q	4639, 4702-03, 22084-85	
1043-2w same as 1157-b 1043-2y withdrawn for 1367	4637, 4639, 4707, 4709-10, 7318-23, 10138-39, 10141, 20308-09, 22078-85, 22087-88	
1043-3a	4637, 4710, 7225-30, 22084-85	
1043-3g withdrawn for 1361 1043-3h withdrawn for 1363 1043-3i withdrawn for 1362	4639, 4716, 4718-19, 4723, 4765-66, 10123-27, 10135-36, 10139, 10141, 20308-09, 22078-85, 22087-88	
1043-3L withdrawn for 1146 1043-3m withdrawn for 1151	4638, 4722, 4726, 7198-201, 7231-32, 20308-09, 22087-88, 22090	
1043-3o, 3q, 3s, 3t, 3v, 3z	4637, 4639, 4728-31, 4734-35, 4739-42, 22078-85, 22087-88	

Comm. Ex. No.	Transcript References
1043-4d withdrawn for 1365	4639, 4743, 10137-38, 10141, 20308-09, 22078-85, 22087-88
1043-4j-4k 1043-4m withdrawn for 1142	4637-38, 4751-52; 7239-41, 20308-09, 22078-85
1043-4n withdrawn for 1154	4638-39, 4753-54, 7244-45, 10138,39, 10141, 20308-09, 22078-85
1043-4o withdrawn for 1366	
1043-4q 4r 4v 4w 4x	4637, 4754-57, 22078-85, 22087-88
1050-b	4829-35
1062	4964-67
1081 W-2a	13680-81, 13686-87, 17270
1196 f-k m-r 1197	8279-89, 8298-301, 8304, 8307-09, 8479-81, 8501, 8507-08
1499 1500 1501 ab	11537-41, 11544-47, 19918, 19921-26, 19999, 20000
2203	12557, 12559-62, 12565-66, 12569
2250	12826-27, 13757
2390 2401	13501, 13510, 17273-82, 17457-58
2830	14831-33, 14882

Section VI.

The unauthenticated writings purporting to be excerpts from minutes of meetings of the American Association of Portland Cement Manufacturers and the Cement Manufacturers' Protective Association, the reception in evidence of which is assigned as error in Assignments Nos. 40 and 40(d) herein, together with the transcript references relating thereto are as follows:

Comm. Ex. No.	*Transcript References*
3235 3236	Tr. 28114-28133, 28233, 34995-35004, 35439-55, 35457-58, 35622-29, 36093-96

Appendix C

Section I.

	Rulings in favor of Commission	Rulings against petitioners and their co-respondents
Receipt of opinion testimony as to "competition"	Tr. 363) Tr. 191-93) Tr. 397-98)	Tr. 34865-69
	Tr. 819-20	Tr. 30190
Use of leading questions	Tr. 846	Tr. 13294
	Tr. 331-32)	Tr. 30393
	Tr. 618)	Tr. 31014-15
	Tr. 782	Tr. 30045
	Tr. 335	(Tr. 13262-65, (13267
Relevancy, as to conditions in other industries and other matters	Tr. 454) Tr. 18813-14 Tr. 1145	Tr. 26044-6
	Tr. 81	Tr. 34418
	Tr. 189	Tr. 36729-30
	Tr. 2210-11) Tr. 4854-55) Tr. 2551)	Tr. 43086-88
	Tr. 2392-93	Tr. 18308-11
	Tr. 3177-85	Tr. 31185-87 Tr. 34263-67
Receipt of repetitious evidence	Tr. 963 Tr. 33246	Tr. 26221
Compelling answers to questions	Tr. 30299-300 Tr. 36767-68	Tr. 18376-7
Use of papers prepared by others to refresh recollection	Tr. 10218-21	Tr. 40185-86 Tr. 36262-65
Use of speculative and broad questions	Tr. 28651 Tr. 24564-67 Tr. 5013-16	Tr. 30045
	Tr. 14152-54	Tr. 32724-26
	Tr. 496-97	Tr. 37580-81

	Rulings in favor of Commission	Rulings against petitioners and their co-respondents
Receipt of evidence of acts subsequent to the date of the complaint	Com. Ex. 2631A-4R	Resp. Ex. 3043-44
	Com. Ex. 1387	Tr. 37517-18
	Com. Ex. 3345	Tr. 32213-17
	Com. Ex. 2558-60	Tr. 39104-11
	Tr. 317-18	
Application of best evidence rule	Tr. 30213-15	Resp. Ex. 3063-64 Tr. 40086-93
	Tr. 30771-72	Resp. Ex. 2894 Tr. 38047-57
	Tr. 277	Resp. Ex. 3160 - Offered Tr. 40639; excluded Tr. 40639
	Tr. 909-10	Tr. 11661-65
	Tr. 2780	
Permitting witnesses to explain their answers	Tr. 18324-25 Tr. 18393	Tr. 35572-73 Tr. 43551-52

Section II.

Rulings in favor of Commission	Rulings against petitioners and their co-respondents
Tr. 5373-75	Tr. 28852-59
Tr. 1673-95	Tr. 28717-18
Tr. 1385-1405	Tr. 32865
Tr. 8336-48	Tr. 34290-91
Tr. 8354-56	
Tr. 13126	
Tr. 13374-75	
Tr. 8313-18	
Tr. 8302	

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

(Caption—8371)

STATEMENT OF POINTS IN SUPPORT OF PETITION TO SET ASIDE ORDERS OF THE FEDERAL TRADE COMMISSION.

(Filed March 20, 1944, Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioner, Marquette Cement Manufacturing Company (hereinafter referred to as Marquette) hereby specifies the following points upon which it intends to rely in support of its petition to set aside the several orders of the Federal Trade Commission (hereinafter referred to as the Commission):

Part A.

Petition and Motion of Marquette to Recuse the Commission.

As to the petition and motion of Marquette to recuse the Commission from passing upon the issues in the case under the complaint of the Commission against the Cement Institute and seventy-five producers of portland cement, including Marquette, and from entering any order in relation thereto, because of bias, prejudice and prejudgment of those issues:

Marquette Exhibits.

1. The Commission erred in not allowing Marquette's offer in evidence of the twenty-three publications containing public statements made by, or on behalf of the Commission which were referred to, described in and filed with the said petition to recuse (being marked for identification as Marquette's Exhibit 1 to Exhibit 23, inclusive) and which formed the basis of the charge of bias, prejudice and prejudgment of the Commission as set forth in the said petition.

Order Denying Marquette's Petition and Motion to Recuse.

2. The Commission erred in denying the petition and motion of Marquette to recuse the Commission in that as a matter of law and as a matter of due process guaranteed by the Fifth Amendment of the Constitution of the United States, your petitioner, Marquette, had the right to have the issues of fact contained in the charges brought against it, which constituted a charge of violation of certain anti-trust laws of the United States, including the Sherman Act, tried before a tribunal free from bias and prejudice.

Commission's Findings in Support of Its Order.

3. The Commission erred in that in its order denying the petition and motion of the petitioner, Marquette, to recuse the Commission it set forth certain findings, statements and conclusions as grounds for the order of denial by the Commission, which said findings, statements and conclusions were not supported by any evidence, facts or circumstances in the record, and are substantially inaccurate, misleading and contain materially false statements.

Part B.

"Order to Cease and Desist" and Other Orders Issued by the Commission on July 17, 1943.

Without waiving the Points specified in Part A above, Marquette hereby specifies the following Points upon which it intends to rely in support of its petition to set aside the "Order to Cease and Desist", and the other Orders issued by the Commission on the 17th day of July, 1943:

4. Pursuant to order of this Court entered herein on the 25th day of January, 1944, Marquette hereby adopts the several points and assignments of errors set forth in the "Statement of Points Upon Which Petitioners Intend to Rely" filed in this Court by the petitioners in cases Numbers 8360, 8361 and 8410.

Marquette's Separate Defense.

5. The Commission erred in failing to recognize that petitioner, Marquette, filed its separate answer raising separate issues as to the Complaint and conducted its separate independent defense to the charges contained in the Complaint, and the Commission further erred in failing to make separate, specific Findings as to the Facts with regard to Marquette as to the several issues formed by the several charges in the Complaint and the Answer of Marquette thereto.

6. The Commission should have recognized and should have made findings as to Marquette in accordance with the Answer to the Complaint filed by Marquette, not only specifically denying every material allegation of the Complaint, but, differing from other Answers, specifically setting forth the following:

(a) Marquette denied that any officer, individual trustee, committee, bureau or other agent of the Institute, has had any power to bind the Institute, or the members thereof, as to any matter affecting the policies, functions or operations of the Institute, but on the contrary that the Institute and its several trustees, officers, committees, bureaus and agents as shown by the Articles of Association of the said Institute, extant as of the date when the said Petitioner became a member of the Institute, had only limited powers and purposes as provided in the said Articles of Association, which powers were to be exercised solely by a board of trustees in meetings duly assembled, and that the purposes were limited to those set forth in the said articles; that Marquette was not at any time a member of or affiliated in any manner with the Institute prior to the 15th day of June, 1933, and that it joined the said Institute at that time, relying solely upon the new Articles of Association, extant as of that date, and for the limited purpose of doing its part under the National Industrial Recovery Act toward the formulation and adoption of a Code of Fair Competition for the industry, and upon the information that other members of the industry were joining the Institute for similar purposes;

(b) As to the charge that Marquette had agreed with the other producers of cement to cooperatively employ "what is known as a multiple basing point system of pricing" under which "all cement, wherever produced, is sold only

at delivered prices", Marquette stated that within its marketing area cement is generally sold at destination prices but denied the charge of agreement or combination to sell cement at destination prices, at any agreed prices or in any particular manner, and though such destination price method of selling has been referred to as a "multiple basing point method of pricing" and though mills which have from time to time assumed leadership have been referred to in the industry as "basing points", such so-called "basing points" are not arbitrarily determined, have no fixity in number or geographical location and are not the result of any agreement or understanding; that for these and other reasons to appear in the subsequent proceedings, Marquette asserted that "basing point" terminology has been inaccurately and erroneously used in referring to the cement industry, and that the destination price method which has generally prevailed in the industry is to be distinguished from so-called single or multiple "basing point systems" such as have prevailed in other industries;

(c) That as to the freight rate books referred to in the Complaint as published by the Cement Institute in making effective the alleged combination in restraint of trade, Marquette specifically denied that it had made any use thereof at any time for any purpose and Marquette stated that, on the contrary, it had for many years, long antedating its membership in the Institute, continuously maintained its own traffic department which did and still does continuously collect and assemble official tariffs relating to the rates of freight on cement in the territory in which the said respondent operated and does operate;

(d) Marquette further set forth that the freight-rate schedules published by the railroads or traffic associations of railroads are a matter of great complexity and intricacy and that therefore it has been and still is necessary for freight rates on shipments of cement to be figured by experienced experts such as Marquette has employed, and that it would be practically and economically impossible for contractors, dealers, and other customers who purchase Marquette's cement to make accurate use of freight-rate schedules published by or for railroads;

(e) Marquette specifically denied that it had individually or by agreement or combination with others, made any effort to thwart the Government of the United States

in securing f.o.b. mill prices on cement at any time, or in obtaining the full benefit of land-grant rates, and set forth that the government has always had it in its power to obtain the full benefit of such land-grant rates, and that Marquette has, to the best of its ability, cooperated with and aided the Government of the United States and its officials in obtaining such maximum benefits and that the respondent has frequently quoted prices on, and sold cement to the Federal Government on an f.o.b. mill basis.

The Issues Are Limited.

7. In drawing its Findings as to the Facts and Order to Cease and Desist, the Commission failed to recognize that the issues were circumscribed by the Complaint, by the Answers, by statements made of record by trial counsel for the Commission during the proceedings before the Trial Examiner and before the Commission, by statements and rulings by the Trial Examiner with the consent or approval of counsel for the Commission, including among others the following:

Combination Is the Only Issue.

Tr. 39824

*Mr. Wooden: "This case is concerned wholly with the question of an alleged combination."

"Basing Point System"—Age of.

Tr. 9735

Mr. Zimmerman: "You say it goes back as far as the 'basing point system', this supposed wrong-doing or impropriety that the Respondents are called to account for now. How many years back would that be?"

Mr. Wooden: "Oh, I think we can show that in a few minutes if we get past this by some statements—"

Mr. Wooden: "I think it goes back to since 1900."

*The various names before excerpts from the transcript of testimony are those of Counsel appearing for the parties to the proceedings before the Commission as follows: Assistant General Counsel Wooden, Mr. MacIntyre and Mr. Paulson for the Commission; Mr. Zimmerman for Marquette; Mr. Leisure, Mr. Withrow, Mr. Seeley, and Mr. Werle for the Cement Institute, *et al.*; Mr. Smith for Huron Portland Cement Co.

Complaint—Paragraph 3; Nature of the Product.

Cement is a standardized commodity, made in standardized specifications, considered by buyers as not differing substantially among producers in quality, except as between recognized and standardized grades thereof. It belongs to the class of heavy goods, carriage charges of which constitute a substantial cost to the consumer.

Regarding Complaint, Paragraph Eight and Nine.

Tr. 37494

Trial Examiner Norwood: "Well, what I think about it is, you are faced with these pleader's conclusions as to effects."

Mr. Werle: "Well, Your Honor has called them 'effects,' but I have looked them over quite recently again, and it seems to me they are allegations of pure straight facts. That is what they appear to me. They are labeled 'effects,' but the label does not mean anything when you look at what they say. There are factual allegations in there. This is a factual allegation: 'The buying public pays the same prices precisely as though there were no natural advantages in producing cement. The result of this is a loss to the buying public.' Well, we can't even show what the result is."

Trial Examiner Norwood: "Yes."

Mr. MacIntyre: "If Your Honor please, as to that, Mr. Wooden has admitted it, and I do again now, that everything in that paragraph 8, as well as paragraph 9, of the complaint may be taken as statements of effects of the operation of any combination that is proven by evidence going to the other paragraphs in the complaint."

Mr. Werle: "Well, the difficulty with that is that, having those effects charged, and having some inferences in the record from which someone might conclude that those effects were present, you then may be able to use the effects to establish the existence of the combination. That is what he objected to."

Mr. MacIntyre: "Mr. Wooden has admitted he will not use any of the statements as to the effects there or any evidence relating to the statements of effects as appear within paragraphs 8 and 9 of that complaint to prove the existence of a combination."

Trial Examiner Norwood: "In other words, you will admit paragraphs 8 and 9 are pleader's conclusions; is that right?"

Mr. MacIntyre: "Under which no evidence has been received in the record or will be considered in arguing this case before the Commission to prove the existence of a combination as charged in the complaint."

Allocation of Business Never in Effect.

Tr. 29195

Trial Examiner Norwood: "And I think that the Commission did put in all of these negotiations about dividing up available business, and the N. R. A. never did adopt that, did it?"

Mr. MacIntyre: "It was a part of the Code with respect to a consideration for that, but they never did approve any plan that the industry ever submitted to them."

Tr. 33070

Mr. Wooden: "As to the matter of allocating business, however, I offer to stipulate that the record does not show that the N. R. A. Code provision for allocation of business was carried into effect, and I shall make no contention that it was, on the present record."

Tr. 37192

Mr. Wooden: "Your Honor, I want to direct attention to the fact that I have been long since stated on the record that there would be no contention made that the plan of allocation of business proposed under N. R. A. went into effect."

Tr. 37776

Mr. MacIntyre: "The only issue here is whether these people have restrained price competition."

No Agreement on Bids.

Tr. 27012

Mr. Paulson: "The Commission has never contended that they sat down around a table and agreed on these bids."

Tr. 27016

Mr. MacIntyre: "Your Honor, while we are here let's address ourselves to this point that Mr. Paulson has already pointed out, that it is not the contention of the Government that these people sat down around the council table and agreed on each specific bid that they are going to submit, but it is the system that is involved, the system. There may be some on which they are agreed, but that does not go to each and every bid. They did not have to do that when they used the system."

Costs and Profits Not in Issue.

Tr. 33886

Trial Examiner Norwood: "That is, that there is no issue involving costs as such?"

Mr. Wooden: "Profits and losses."

Tr. 41457

Trial Examiner Norwood: "In regard to Commission's Exhibit 355-A-D, and 355-A-D, the motion is denied with the restriction said exhibits and all other exhibits and testimony that in fact are contained therein may not be used to indicate what production costs are and whether or not prices mentioned in connection with cement were fair or reasonable with respect to costs, profits, or losses."

Tr. 26391

Mr. Wooden: "My mind is already made up, Your Honor, and that is that the cost figures, as to what the costs are, of the various companies, for any particular item, and for their total costs, are not in issue.

The only thing that I would say is,—whether costs vary or not,—that is relevant; but not what the costs are."

Tr. 26392

Mr. Leisure: "Mr. Wooden said he did not consider costs were in issue. I want to know whether he feels the same way about profits."

Mr. Wooden: "Yes."

Mr. Leisure: "Not in issue?"

Mr. Wooden: "Not in issue."

Tr. 26393

Trial Examiner Norwood: "No comment, and no inference is going to be drawn from the size of the profits."

Mr. MacIntyre: "Size of the profits, losses, or the precise level of costs."

Reasonableness of Prices Not in Issue.

Tr. 29176

Mr. MacIntyre: "I do not see that it has any relation to his method of price making. We are not talking about the level of prices. They are not in issue. The level of prices is not the method of pricing and price-making is in issue."

Tr. 32323

Mr. Wooden: "Your Honor, I object to that, and to the whole line of inquiry, because it goes to the question of the reasonableness of the price quote on it, on that Tygart River Dam, a matter which has not been put in issue at all."

Tr. 32324

Mr. Wooden: "And the witness has just got through testifying that his price on Government business was on the same basis as on commercial business."

Trial Examiner Norwood: "And, as I understood it, he is going to that same point by showing that here was a large order which cost him more; is that right?"

Mr. Withrow: "Yes, Your Honor, and it is one of the jobs on which the Commission put in evidence, and it is specifically one of those jobs, and, as I remember the complaint, there is allegation in the complaint to the effect we, as the result of these various—that the various Respondents, as the result of their method of doing business, have taken more than their share of the public funds, whatever that may mean."

"We certainly are entitled to show that the Federal Government got a good bargain on it, and that they were not entitled to a better price; it cost more money to manufacture their product—more money to service and store their product than ordinary commercial customers."

Trial Examiner Norwood: "That opens up costs, does it not?

Tr. 32325

Mr. Wooden: "I don't think it opens up. We put in the Tygart River Dam bids showing the identical bids.

The witness has already testified that they made the same price on that bid that they did on commercial business. We certainly raised no issue as to the reasonableness of that price or the cost of handling that business."

Mr. Leisure: "Your Honor please, if identical price were the only thing involved in the complaint, I think that Mr. Wooden's objection would be very well, but unless the Commission is willing to stipulate, and we proffer such stipulation now, if they fell that this is not material, then there is no issue as to the reasonableness of the price that we quoted to Tygart Dam,"

Tr. 32326

"and we will not press this point."

Trial Examiner Norwood: Well, it seems to me, under the pleadings, the reasonableness of price is necessarily involved in this statement there that this industry is taking more of the public income."

Mr. MacIntyre: "Your Honor please, that is alleged as the effect. If you have a non-competitive price, of course, one of the effects naturally flowing from that is one of unreasonableness, such as anyone could conclude; but it is not an allegation as to the existence of a combination in bringing about the non-competitive price, itself, and, as Mr. Wooden has just admitted, the bid, itself, and the abstract of bids, were put in for the purpose of showing the non-competitive character of the prices quoted. Beyond that, he did not attempt to show anything."

Tr. 32328

Trial Examiner Norwood: "Well, reasonable restraint does not necessarily flow from reasonableness of price, and that is one of the things in the decision regarding anti-trust cases."

Trial Examiner Norwood: "So if you agree to eliminate reasonableness of price from the case, it would have no such effect, as you pointed out there."

Mr. Wooden: "We contend, your Honor, that a non-competitive price is inherently unreasonable."

Tr. 32329

Trial Examiner Norwood: "He is showing here a reduction of profits."

Mr. Wooden: "Yes, but as to the reasonableness of the price, it is practically the same question."

Trial Examiner Norwood: "I am going to say, like I said heretofore, that if in the confusion of the issues at the start of this case we have received any evidence."

Tr. 32330

"going to the reasonableness of price, I will entertain a motion to strike it."

"I am going to sustain the objection here and strike this answer."

Trial Examiner Norwood: "And not permit any further testimony here going to this reasonableness of price."

Whether Prices Are Made F. O. B. Mill or F. O. B. Destination Is Not in Issue.

Tr. 21432—Lines 2-5

Mr. Wooden: "Your Honor, I have never contended, and I have said frequently that we never intended to infer that it was an invariable rule that they quoted f.o.b. destination."

Tr. 37824

Mr. Paulson: "I do not recall anything in the nature of establishing of f.o.b. mill prices in this case. The complaint, as I understand it, says they should not sell concertedly at delivered prices. I do not believe the alternative to that is selling f.o.b. mill."

Trial Examiner Norwood: "Oh, I think he could show what the effects would be if he can produce facts to show whether or not is bearing on a reasonable or unreasonable restraint of trade."

Mr. Paulson: "How could that bear on that question? I do not see it. This complaint does not contain any matter which should be taken, or would indicate that the Respondents will be required to sell f.o.b. mill."

Trial Examiner Norwood: "No. You have evidence in here that this method is uneconomical, and all that sort of thing, and he has a right to show what the effects would be of selling exclusively f.o.b. mill."

Mr. Paulson: "Oh, I do not think so at all because the issue here is solely, do these Respondents price their product concertedly and collusively."

"Now, we do not care at all whether they price—so far as the complaint is concerned, there is no point made of

whether they price f.o.b. mill or whether they price f.o.b. destination.

Tr. 21432

Mr. Wooden: "Your Honor, I have never contended, and I have said frequently that we never intended to infer that it was an invariable rule that they quoted f.o.b. destination."

Tr. 37833

Mr. Paulson: "I just wanted to make clear what I understand the Commission's position to be. I know of no exhibit to show the effect of f.o.b. mill selling"

Tr. 37834

"or the effect if these Respondents were confined to f.o.b. mill selling."

"The Commission has taken the position that is not in issue. I do not believe the economists testified on that point. I do not believe there is a scintilla of evidence in the Commission's case whereby we seek to prove that f.o.b. mill selling is more advantageous and better than the delivered price selling."

Delivered Prices Are Advantageous to the Cement Producer.

Tr. 33370

Trial Examiner Norwood: "Well, I am willing to have"

Tr. 33371

"him show this instance here, which illustrates an advantage accruing to the Respondents from adopting a delivered price policy."

Mr. MacIntyre: "Yes, but it did not go to their decision in adopting the policy. The policy was adopted years ago. This occurred in 1939. It could not have influenced them in the adoption of the policy. That makes it irrelevant and immaterial to the question as to why they adopted the policy."

Mr. Smith: "The principle was applicable then."

Mr. MacIntyre: "Not at all."

Mr. Smith: "It can't help but be at that time."

Trial Examiner Norwood: "I think he can show this particular instance, if he will do it briefly."

Mr. Wobden: "Your Honor, may I say this one thing?"

Trial Examiner Norwood: "Yes."

Mr. Wooden: "There may be a difference—there is all the difference in the world between a policy of selling at a delivered price and the use of a basing-point system of delivered prices."

Trial Examiner Norwood: "Yes, I understand that, but I find that the courts in some of these other cases have permitted full information as to the advantages and disadvantages of the practices. I think, if he will do it briefly, he might illustrate that by this one case."

Tr. 33372

Q. (By Mr. Smith.) "Now, can you tell us briefly just what happened in that one case?

A. "This car of cement, containing 160 barrels, loaded by us at Detroit, consigned to the Works Progress Administration at Detroit, moved from Detroit via the Michigan Central past our Saginaw plant within two blocks, up on to Alpena, where the cement was used."

Trial Examiner Norwood: "That was sold on a delivered price basis, was it?"

Mr. Smith: "No, it was sold—"

The Witness: "It was sold in Detroit."

Mr. Smith: "— in Detroit."

The Witness: "We paid no freight."

Mr. Smith: "They paid no freight."

Q. (By Mr. Smith.) "It was sold in Detroit, where you have a plant is that right?"

A. "Yes."

Q. "Now, what was the price in Detroit?"

A. "The price of it was—the Procurement Division was buying that at $1.66 per barrell."

Q. "And what is the freight rate from Detroit that they paid to Alpena?"

Tr. 33373

A. "Fifty-seven cents, approximately; yes, 57 cents."

Q. "So if they paid the tariff rate, they paid 57 cents on top of the $1.66?"

A. "Yes."

Q. "And what was the price in Alpena at that time?"

A. "$1.79."

Customers Want Delivered Prices.

Tr. 27566

Trial Examiner Norwood: "And he has told us that he never has, in his experience, received a request from a customer for an f.o.b. mill price.

Now, why do you want to prove that, then, by considerable documentary evidence here which has been objected to, and which will add to the record here unnecessarily, until that is denied?"

Tr. 27567

Trial Examiner Norwood: "Yes."

"I do not think those documents contain any new information about his method, and we have had enough of that illustrated here, and the fact that they do request f.o.b. mill—f.o.b. destination prices—has been sworn to by this witness, and I do not think that there is any evidence, or will be any, to the contrary."

Tr. 32134

Mr. Withrow: "These are requests by the United States Government, or by State Governments, solely for delivered prices."

Mr. Withrow: "I tried to get this point in by oral testimony, and I was met by the objection of counsel for the Commission that was not the best way to do it, orally, and I am now proposing to do it in the manner that they forced me to do it."

Trial Examiner Norwood: "Aren't there dozens and dozens of exhibits showing that the Government asked for bids just in the way that these exhibits show?"

Mr. Paulson: "Yes, that is what I say."

Mr. Paulson: "That is why I wanted to know the particular purpose that they are offered here for."

Tr. 32139

Trial Examiner Norwood: "I think that in view of the slight relevancy of this whole matter, and in view of the fact that there is an abundance of evidence in to the same effect—that is, so far as the purposes have been explained to me heretofore—that we shall waste no further time on exhibits of this nature which are offered to show the customers asked for destination prices.

"I shall sustain the objection."

Tr. 32142

Trial Examiner Norwood: "Go ahead. That gives you an exception on all invitations. They are offered here to show that the Government, or anybody else, requested delivered prices.

Go ahead.

Please do not offer any more of them to be marked."

Tr. 34429

Q. (By Mr. Withrow.) "Will you tell us the usual form of request for bids on cement by Government and State Departments? Is it f.o.b. mill or f.o.b. destination?"

Mr. Wooden: "Your Honor, if there is anything that I think has been shown in this case over and over again, and shown by us, it was the usual method of requesting business on a destination basis."

Mr. Withrow: "If the Commission concedes the point, why, of course—"

Mr. Wooden: "We proved it."

Mr. MacIntyre: "We have stipulated and we stipulate again as to the ultimate facts, that each Respondent can produce a number of requests from a number of customers showing that such customers asked for quotations of prices at delivered points and at job sites."

Tr. 36890

Trial Examiner Norwood: "I think it has been stipulated and admitted that these special services are rendered to customers and different kinds of services are rendered to customers by all companies.

I think the Commission will take judicial notice of it. Anyway, there is abundant evidence in the record on it, and the objection is sustained; and I shall ask counsel not to have any more papers like that marked, to take the time here to mark those papers.

I have made rulings on that. Counsel has the advantage of many exceptions on it, and it will serve no good purpose to continue to offer papers of that character, or papers to show that dealers desire delivered prices, papers to show that dealers approve of Respondents' policy, card indexes to show that the Respondents have some system of recording their prices."

Tr. 36891

Trial Examiner Norwood: "That goes with respect to all Respondents whose evidence is to be produced here-

after; as to those from whom we have already heard, why, their matters are taken care of on the record."

Tr. 38857

Mr. Wooden: "It is objected to as immaterial."

Trial Examiner Norwood: "What is this to show, Mr. Withrow?"

Mr. Withrow: "It is to show a specific form used by one of the customers of the Southwestern Company, specifically stating that they do not want prices quoted to them f.o.b. the mill, and if the Southwestern Company insists on quoting f.o.b. the mill, whatever information Southwestern must furnish."

Trial Examiner Norwood: "The objection is sustained."

Buyer's Cost at Destination Controls Purchase.

Tr. 28048

Q. "What has been your observation with respect to f.o.b. mill? When f.o.b. mill prices have been quoted to the Federal Government, as to whether or not the awards were made by the Federal Government on the basis of those prices?"

Trial Examiner Norwood: "That would lead tremendously to cumulative testimony. The witnesses on both sides have said that they never award on the basis of what it figures back to the mill, but on the basis of what it costs the Government to lay it down at the particular point, and there isn't any use of spending a second of time on that."

Tr. 32672

Mr. Wooden: "Your Honor, here is another point where we have had testimony over and over again on that point, and I think I have frequently offered to admit that the Government, like any other purchaser that wants to use cement at a given place, will naturally figure the cost of it from various sources, at the place it wants to use it, in order to determine which is the most advantageous purchase,—no dispute about it."

Tr. 32674

Mr. Wooden: "This admission applies to all periods of time. It is an all-inclusive proposition that any purchaser

is going to find out what it is going to cost him laid down at the place. We do not need any proof on it."

Tr. 32134

Trial Examiner Norwood: "You have shown numerous times, in numerous exhibits here that the Government did ask for alternate bids; that is, for f.o.b. mill and destination cost bids, and also evidence by the Commission's own witnesses, and exhibits, that in all cases the Government awarded the contract on the destination cost."

Market Is at Destination.

Tr. 11834

Trial Examiner Norwood: "Was there any general price for cement?"

The Witness: "There is a market price of cement."

Trial Examiner Norwood: "For all destinations?"

The Witness: "For all destinations as they apply to our contract with the cement mills for the cement used by the State of Illinois."

Trial Examiner Norwood: "For delivery in the State?"

The Witness: "Yes, sir."

Trial Examiner Norwood: "What was that price?"

The Witness: "Well, the price varies according to the destination. There are 102 destinations in the State of Illinois."

Nature of the Demand for Cement.

Tr. 37179

Mr. Wooden: "Your Honor, I am going to admit what is a matter of common knowledge, and of which judicial notice might be taken, that during the 1920's up to 1929, that almost all the industries, including the cement, showed increasing, sharply increasing demands for their products."

Mr. Wooden: "I want to offer now to stipulate that the demand in the territory of every mill in the industry has been a fluctuating demand; that it is not uniform over all its sales area."

Trial Examiner Norwood: "Will counsel make that in the form of an admission?"

Mr. Wooden: "Yes."

Trial Examiner Norwood: "I do not think you need to prove it, then."

Dealers Are Backbone of Cement Business.

Tr. 25656

Trial Examiner Norwood: "I do not believe that anyone will deny that the dealer trade is the backbone of the cement business. I do not think there is anything in the evidence to deny it, and there is much in the evidence to confirm it, and there are some figures and factual matter, so I think this is a rather roundabout way to establish something that nobody denies, and I think it might just as well remain marked for identification here, and let the counsel put it in at some time that its relevancy appears in a greater degree than it does at this time."

"I shall sustain the objection."

(The Trial Examiner having reference to Respondents' Exhibits, for identification, 1032, 1033, 1034, and 1035.)"

(Wooden had objected that "irrelevant.")

Tr. 26023

Trial Examiner Norwood: "I think the point has been well covered. I think that any additional testimony from this witness as to the desirability of dealers, as affecting cement companies generally, selling a larger percentage of their output to the dealers any such testimony as that would be cumulative.

He may make the statement here that it is the same with his company, but it seems like we are wasting time on that."

Mr. Werle: "The same as what?"

Trial Examiner Norwood: "Nobody disputes that; nobody disputes that."

Mr. Leisure: "Does your Honor mean by that that when one company has completed its testimony as to whether or not dealers are important, that when a separate defendant gets on the stand he is foreclosed from saying that dealers are important to him?"

Mr. Wooden: "Well—"

Trial Examiner Norwood: "That is a fact that is not disputed as to any of them."

Tr. 26024

Mr. Wooden: "I will make it unnecessary by agreeing to stipulate that the dealer trade, for all Respondents, if

they want it that way, is an important factor in their business."

Mr. Wooden: "The greater the importance of the dealer the more probable it is that they defer to the wishes of their dealer, as they have done, and as we approve for them to do."

Trial Examiner Norwood: "It is a large and substantial part."

Mr. Wooden: "Yes, that is true."

Trial Examiner Norwood: "Of the business of every Respondent."

Mr. Wooden: "Yes."

Trial Examiner Norwood: "Why try to prove that any more? He had admitted that."

Tr. 28570

Mr. Paulson: "I think that is correct, your Honor, and I think that Mr. Wooden stood up at the hearings at Washington and admitted that dealer business is the backbone—"

Tr. 28571

Trial Examiner Norwood: "Yes."

Mr. Paulson: "—to the cement manufacturers' distribution system. I think that is on the record."

Trial Examiner Norwood: "It has been shown."

Mr. Seeley: "How can he admit that for every Respondent that way?"

Mr. Paulson: "You certainly do not dispute it as to one Respondent and try to prove it as to the other. You want to prove the point. Mr. Wooden says, "I concede the point."

"I think I am correct on the record on that, so there is nothing more at issue."

Tr. 28572

Trial Examiner Norwood: "I do not think there is any evidence to the contrary that the manufacturers—the main part of their business, the substantial part, is through dealers; that it is a diversified business; that it is more substantial for that reason, goes through many small sources, and does not subject him to violent reactions in the matter of quantity, as between one year and another."

Dealers—Source of Information as to Changes in Going Market Prices.

Tr. 39231

Mr. Withrow: Well, if counsel for the Commission is willing to concede that friendly dealers and contractors"

Tr. 39232

"go to their source of supply for cement and offer them the business when other companies offer their concessions, either in price or in terms and conditions or special services, I will desist from this line of inquiry to the end of this case, both with this witness and all others."

Mr. Wooden: "I will concede that this witness may be taken to have already so testified."

Mr. Wooden: "I am willing to concede that other witnessses from other companies, Respondent companies, would so testify."

Tr. 39231

Q. (By Mr. Withrow.) "Would you tell us whether or not your friendly dealers or contractors from time to time come to you and offer you the business if you will meet a concession offered to them?"

Trial Examiner Norwood: "You have shown that a great many times. Everybody here knows the answer."

Mr. Wooden: "I will concede that this witness may be taken to have already so testified."

Leads and Lags.

Tr. 40150

Mr. MacIntyre: "We have never assumed, contended, or charged that they receive on the day that they make a price advance the full effect of it."

Sales Competition.

Tr. 32081½

Trial Examiner Norwood: "Well, does the Commission deny or contend that there is not a certain amount of competition between these companies other than price competition?"

Mr. Wooden: "Why, we certainly admit that there is an effort to get business by sales competition."

Trial Examiner Norwood: "Well, that is the same thing."

Mr. Wooden: "Sales effort."

Trial Examiner Norwood: "In the light of that admission, I am going to exclude all other testimony as to this salesman proposition. I think it has been shown so many times in the record that they have their salesmen out, and they do contend with one another for business, and the charge is in that process they have agreed or entered into cooperative action in contending at the same price, and that there is no price competition. Now, that is your issue, and we are going to stick to it."

Sales Policies Approved by Customers.

Tr. 35999

Trial Examiner Norwood: "Yes, but I do not set especial importance on the fact that this particular Respondent got that reaction which has been shown at least a hundred times in this case already by both oral and documentary proof—that the customers approved of their policies."

Terms of Sales.

Tr. 5987

Mr. Zimmerman: "Could I ask Mr. Wooden has that sack charge of 15 cents existed for many years?"

Mr. Wooden: "I think it has. I do not know how many, but it has existed for a number of years."

Mr. Zimmerman: "I guess there always was a sack charge in the industry?"

Mr. Wooden: "The 40-cent cloth sack charge goes back many years. Of course, paper is a more modern method of packing. Whether it has always been 15 cents, the differential, I would not want to definitely say."

Trucking—An Episode of 1931-2.

Tr. 40849

Mr. Wooden: "Your Honor, the only channel by which this subject can be approached is that in 1931 and 1932 this witness headed a movement among competitors represented in the Institute, of which Mr. MacFarland, the president of his company, was president, to eliminate truck-

ing and eliminate it by cooperation with the organized dealers and cooperation with the organized railroads, and this lowering of the short-haul rail rates was simply a part that was expected of the railroads in return for the Respondents' elimination of trucking and restoring the business to the rails."

Water Transportation.

Tr. 37135

Trial Examiner Norwood: "With respect to the motion to strike all the matter in this stipulation appearing under the title 'Water Delivery,' that was the motion?"

Mr. Wooden: "Just one paragraph of that, Your Honor, that my motion was specifically directed to."

Tr. 37147

Mr. Wooden: "Where I object to his cost of shipment by its own barges."

Tr. 37148

Trial Examiner Norwood: "Well, I shall entertain a motion with regard to other exhibits, but I think that I shall allow the motion to strike the entire subject there as irrelevant and immaterial, as denying something that has not been alleged or covered in any way by testimony that these Respondents have to meet. This is just bringing up something and denying it that has not been charged, taking a great deal of time with that process, but I strike that paragraph anyway."

Unused Mill Capacity.

Tr. 36866

Mr. Wooden: "I conceded it once this afternoon, and I will do it again, that every increase in capacity of every particular mill, or the building of a new mill, came about because the promoters or the owners of the mill thought there was a chance of disposing of their output."

Production Control.

Tr. 46755

Mr. Wooden: "We have never charged anything with regard to the use of Mr. Mallory's forecasts of general

business conditions, or demand. We have never charged anything—"

Mr. Seeley: "You have never charged that the subscribers set forth in Commission's Exhibit 3008-A to C, were engaged in a conspiracy in connection with the use of the Mallory service?"

Mr. Wooden: "Why of course not."

Cement Institute—Reasons for Joining.

Tr. 33912

Mr. Wooden: "Your Honor, if it will help any we will be willing to stipulate that not only this witness' company, but other Respondent companies joined The Cement Institute, in anticipation of it, because of the program that was initiated under N. R. A."

Presumption of Innocence.

Tr. 38671

Trial Examiner Norwood: "• • •. The Respondents have their presumption of innocence all the way through."

Essential Facts Omitted From Commission's Report.

8. The Commission neglected to include in its "Findings as to the Facts" essential facts germane to the issues which were established by uncontroverted or unrefuted evidence, whereas, the Commission should have found as to Marquette the following:

A. Marquette was organized in 1898 with a plant at Oglesby, Illinois, called the LaSalle Plant. Lehigh Portland Cement Company and Alpha Cement Company both have plants at LaSalle, Illinois. About 1927 Marquette acquired another plant at Cape Girardeau, Missouri. Running every day in the year, Marquette's two plants could produce 6,600,000 barrels of cement.

B. Marquette sells *delivered cement* in a part of the Mississippi Valley. Marquette does not sell in any seaboard area in competition with imported cement nor does it sell generally in the State of Michigan.

C. Marquette sells most of its product to dealers who comprise the backbone of its business.

D. Cement is offered for sale in competition with numerous other construction materials. Dealers stimulate the sale of cement in competition with other building materials, reduce business risk, decrease the amount of working capital required by Marquette and perform other special services such as assuming the burden of local credit in the sale to the final consumer of cement. Under the temporary government relief program to increase employment, the dealers believed that they were entitled to handle sales to the U. S. Government for the same type of work formerly handled by contractors who in normal times purchased their cement from dealers.

E. Marquette's consistent policy has been to give full protection to its dealers.

F. Cement is a standardized commodity. No dealer and no other purchaser will pay more for Marquette cement at any given destination than for any other brand of cement. Marquette's dealers advise it of the prices and terms of sale offered by Marquette's competitors to enable Marquette to meet this competition. An established market price for delivered cement at all destinations is constantly in force and effect. To every buyer of cement "price" means the cost to the buyer of "delivered cement" at the buyer's point of use. The terms "price", "delivered cost", "destination cost", "delivered price" and "destination price" as used in the record have reference to transactions between cement producers selling their product at whole-sale, and their customers who may be building material dealers, construction contractors or governmental agencies, either federal, state or municipal, and sometimes railroads. As between such buyers and sellers, all of the foregoing terms are synonymous and refer to and mean the price of delivered cement at the buyer's destination. The cost of transporting cement to the buyer's destination is one of the elements of cost which invariably enters into the price for delivered cement and into the total cost to the buyer upon which the buyer determines from what producer he will purchase.

G. As to the charge in Paragraph Five of the Complaint that Marquette, in pursuance of the combination charged in Paragraph Four, employed what is known as the multiple basing point system of pricing under which all cement wherever produced is sold only at delivered prices. Marquette sells delivered cement and quotes delivered prices

because that is the way its customers have always desired and always requested it. There is a single exception to this rule. The exception is when the Federal Government may make an appreciable saving by use of a special freight rate applying only to the movement of Government owned property. In such cases the Federal Government must take title at the shipping point and ship on U. S. Government bill of lading, and it is only in such cases that the Government requests, requires, or derives any benefit from f. o. b. mill prices. In such cases Marquette has always given the United States Government the advantage of whatever saving might be realized from such special freight rates.

H. Marquette has always independently made its own prices. In doing so it has acquired the reputation of being a price cutter and a most aggressive and destructive competitor. Marquette's prices are determined in all instances after considering all of the factors applicable to the territory for which a quotation is to be made. These factors include cost of manufacture, supply and demand, competitors prices and transportation costs. Marquette has never priced its product f.o.b. mill. It has always sold at delivered prices.

I. Marquette has at different times quoted prices lower and also higher than its competitors were quoting for delivered cement. On several occasions within the eight years prior to the filing of the complaint, Marquette has attempted to increase its selling prices for delivered cement only to be forced to reduce again its selling prices to meet the quotations of competitors in order to sell any cement. Competitors do not always follow changes in price. There are leads and lags in price changes and after a period of time there is an adjustment so that market prices for delivered cement naturally seek a common level and become at any given time and place identical.

J. Marquette increased its prices for delivered cement in July, 1932 because it lost over a million dollars and almost went bankrupt. At the time Marquette increased its prices it had already taken orders for all the cement it could manufacture and ship during the balance of 1932. Some of the increased prices quoted by Marquette in July, 1932, to its trade were not met by Marquette's competitors and Marquette had again to reduce these prices to retain the future business of Marquette dealers and customers in these areas.

K. In June, 1933, Marquette negotiated a contract with the State of Illinois for two million barrels of cement at prices lower than those which had been quoted by its competitors to the State of Illinois. With this contract with the State of Illinois, Marquette found that it had booked orders for all the cement it could manufacture and ship for the balance of the year and accordingly in June, 1933, Marquette again announced increases in its delivered prices to its trade.

L. Where savings were possible to the United States Government by virtue of land grant rates or other special rates, Marquette has consistently bid f.o.b. its mill to the United States Government.

M. Marquette owns and operates barge equipment for delivery of bulk cement on the inland river system to Marquette's silos or warehouses at Memphis, Tennessee and St. Louis, Missouri, and occasionally on some specific large job along the rivers which can use bulk cement. Marquette pioneered in offering to sell cement to United States Government f.o.b. barges at Marquette's plant at Cape Girardeau, Missouri. Marquette never received any request for an f.o.b. mill price that it refused. Over a period of ten years next preceding the complaint, Marquette continuously and without interruption, bid f.o.b. mill to the United States Government or f.o.b. barge at mill or f.o.b. cars and public barge line just as the Government requested. Many sales were so made to the Government covering hundreds of thousands of barrels of cement and Marquette's bids were accepted because they were lower than any other bids received. As late as April 15, 1938, a novel form of invitation for f.o.b. mill bids was designed and submitted by the United States Government to Marquette and other cement producers. This was what was commonly referred to in the record as the "Good Friday" invitation. Marquette submitted a bid in response to this invitation which was approved by the Director of Procurement of the United States Government who referred to it in the record with a statement that if all bids had been as responsive as Marquette's the Government's problem would have been solved.

N. Marquette did not always bid the going commercial prices to dealers at various destinations. Frequently over the period of ten years preceding the Complaint, Marquette bid to the United States Government and to state purchasing agencies lower prices than the prices it offered at the

same destinations to dealers and lower prices than those bid by its competitors. Even when Marquette bid the going destination market price, it frequently included in its contract of sale a price decline clause whereby the governmental purchasing agencies automatically became entitled to have any decline in price apply to undelivered balances on its contracts. During each of the eight years prior to the filing of the Complaint Marquette submitted bids to the United States Government lower than any bid submitted by a competitor, and during each of those years the United States Government awarded a contract to Marquette on the basis of Marquette being the lowest bidder.

O. Many invitations to bid put out by Government purchasing agencies contained equalization clauses under which any bidder might offer to adjust his prices to equalize any freight advantage enjoyed by a competitor. The invitations also contained price decline clauses. Government procurement officials have announced their approval of a policy that any bidder should have the opportunity to equalize differentials that might be involved in bid prices, whether freight rates or others. State Highway Purchasing Agents frequently refused to make awards to the lowest bidder, but after the bids were received, allowed and encouraged local cement producers to submit new prices identical with the lowest bid price received.

P. Marquette on a number of occasions submitted bids to state governmental bodies at prices lower than competitors but received no advantage therefrom, the state allowing competitors to reduce their prices to meet the prices bid by Marquette.

Q. Marquette had no connection with the Cement Institute or any of its activities until June, 1933. Under date of June 15, 1933, Marquette applied for membership in the Institute subject to Marquette's approval of the Code then being formulated. Marquette joined the Institute to protect its interest in the formulation of the Code. At the time Marquette joined the Institute, its Articles of Association were revised and its code of ethics had been abandoned.

R. Under the Articles of Association in force and effect while Marquette was a member of the Institute, the powers and purposes of the Institute were strictly limited. Its powers could be exercised solely by the Board of Trustees in meetings duly assembled and there was no provision

for delegation to the trustees or any individual officer, trustee, comittee, bureau or other agents. At no time was any officer, employee or representative of Marquette a trustee or officer of the Institute or a member of any committee of the Institute or a member of the Code Authority or any committee thereof.

S. In July, 1936, Marquette refused to submit to the Institute any more information as to its records of production and sales to the Institute. It also ceased paying dues to the Institute. In September, 1936, the report of a Committee appointed June 19, 1936 to consider the dissolution of the Institute was approved and the activities of the Institute were materially restricted. On April 22, 1938, it formally resigned as a member of the Institute. Marquette had continued its membership in the Institute because of the possibility of a new code and other new regulatory measures by the Government.

T. As to the proposed N. R. A. Code, Marquette presented objections to the Institute and subsequently to the National Recovery Administration. Marquette objected that the Code should cover wages and hours of employment only. After approval of the Code, Marquette filed a Petition for Modification following which the Code was amended by the National Recovery Administration.

U. Marquette has made its own freight-rate books for 25 years. It has never used the Cement Institute freight-rate books. The computation of freight rates is complicated and requires the services of experts such as are employed by Marquette.

V. As to trucks coming to Marquette's mill to buy f. o. b. mill, there is no evidence connecting Marquette with any such alleged circumstance.

W. In accordance with its policy of protecting its dealers, Marquette has always refused to allow diversions of cement shipments. Marquette objected, however, to the incorporation of any provisions covering diversions in the N. R. A. Code.

X. During the N. R. A. Code days, Marquette had on file with the Code Authority an f. o. b. mill price for bids to the United States Government. Marquette submitted its filed f. o. b. mill price to the United States Government on lettings unless a destination cost price filed by a competitor with the Code Authority would give the U. S. Government a lower destination cost than Marquette's f. o. b. mill price

plus applicable freight. In this event Marquette met the lower destination cost price filed by a competitor with the Code Authority pursuant to the Code. Marquette has never corrected or withdrawn a bid or sought to do so.

Y. Marquette did not change its policy of affording full protection to its dealers in 1930 when Lehigh announced its plan of rewarding dealers at the end of the year. Marquette objected to the inclusion in the N. R. A. Code of provisions covering dealers or the classification of customers on the basis of listing classes that would not be sold directly.

Z. Marquette's terms and conditions of sale have been at all times independently determined by it to protect its dealers and to guard against any competitor acquiring competitive advantage. Under date of December 30, 1939, Marquette announced to its trade that it also would prepay all freight on its cement shipments in order that Marquette's customers would not be at a competitive disadvantage in competing with other cement purchasers buying from Marquette's competitors who announced on December 27, 1939, that they would prepay freight on cement shipments.

AA. Marquette has never been in competition with imported cement and has not engaged in any boycotting of dealers or espionage.

BB. Marquette's consistent policy has been that its own figures on production and shipments should not be disclosed to its competitors. During the Code period and for a short while thereafter, while there were prospects of another N. R. A. Code, Marquette submitted such statistical information as was required by the N. R. A. Code. Thereafter, Marquette again ceased disclosing such statistical information to its competitors.

CC. Marquette has never consulted the Institute or any of its officers or representatives as to Marquette's policies.

DD. Some commercial buyers of cement are located in the same general marketing area where they are in competition with each other, but the transportation costs from the mill selling these buyers differs for each buyer. In such cases, in order not to place any one buyer in the same marketing area at a competitive disadvantage, Marquette follows the established custom of selling all of its customers in the same marketing area at the same price.

EE. Marquette has never combined, conspired, agreed or reached any understanding with any competitor with respect to Marquette's prices or with respect to any par-

ticular method or practice to be followed or not to be followed by Marquette in the manufacture and sale of its cement.

FF. Marquette has never agreed or conspired with any other producer of cement to use "what is known as a multiple basing point system of pricing" or any other system or method of pricing.

GG. Marquette has never employed "what is known as a multiple basing point system of pricing" as charged in the Complaint.

HH. Marquette has not been involved in any agreement or cooperation to prevent diversions of cement shipments in transit.

JJ. Marquette did not conspire or agree with any other producer of cement to deprive the Government of land-grant rates.

KK. Marquette did not conspire or agree with any other producer of cement to use the freight rates contained in the Institute freight-rate book even if they were incorrect or to make any other use of the Institute freight-rate book in any manner.

LL. Marquette did not in any manner conspire, agree or cooperate with any other producer of cement to divide customers for cement into various classes to whom it would be sold in any particular manner.

MM. Marquette has not by agreement, cooperation, combination or collusion of any kind with any other producer of cement bid identical prices to Governmental agencies or to others.

9. The Commission erred in denying the "Motion to Dismiss" filed by Marquette as to each count of the Complaint.

10. The Commission erred in denying the "Motion to Reverse Certain Rulings by the Trial Examiner" filed by Marquette.

11. The Commission erred in failing to sustain "Exceptions of Respondent, Marquette Cement Manufacturing Company, to the Trial Examiner's Report on the Evidence."

12. The Commission erred in receiving and considering as to Marquette non-factual testimony by economists concerning the application of principles and theories of economies in hypothetical situations purporting to present factual situations in evidence, in that the testimony of economists was not germane to the issues formed by the Complaint and Marquette's Answer and upon which the

case was tried and in that the hypothetical questions propounded to said economists were not based upon facts and circumstances as to Marquette which were contained in the evidence.

Dated at Chicago, Illinois, the 20th day of March, 1944.

Respectfully submitted,
Zimmerman and Norman,
By Edward A. Zimmerman,
William R. Englehardt,
Partner,
Attorneys for Marquette Cement Manufacturing Company.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8372) * *

STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY.

To the Honorable the Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioners in Case No. 8372 (corporations duly organized in the respective states indicated), Calaveras Cement Company (Delaware), Pacific Portland Cement Company (California), Santa Cruz Portland Cement Company (California), Spokane Portland Cement Company (Washington) and Yosemite Portland Cement Corporation (Delaware), having duly filed with this Court on the 9th day of August, 1943 their petition to review and set aside an Order to Cease and Desist of the Federal Trade Commission made and entered on the 17th day of July, 1943, by their attorneys, now jointly and severally make and file the following Statement of Points setting out the assignments of errors which each of them intends to urge and rely upon in support of their said petition:

1. Your petitioners, pursuant to paragraph 11 of the order of this Court duly made and entered on the 25th day of January, 1944, hereby incorporate, adopt and employ as their own with the same force and effect as though set forth in full herein, each and every part of the Statement of Points, being more particularly paragraphs numbered 1 through 47, inclusive, together with each subpara-

graph, filed herein on behalf of petitioners in Cases Nos. 8360, 8361 and 8410.

2. Your petitioners assign as error the finding, whether express or implied, by the Commission in subdivision (o) of paragraph Eight, that, in practice, each of your petitioners who was a member of the Pacific Coast Cement Institute requested information on land-grant rates as needed or at all, since said findings is not supported by the evidence.

3. With respect to paragraph Nine (d) of the findings, your petitioners assign as error the failure of the Commission to find that none of your petitioners ever withdrew or corrected a bid or sought to withdraw or correct a bid.

4. With respect to paragraph Eleven (c) of the findings, your petitioners assign as error the failure of the Commission to find that none of your petitioners ever made a 15¢ or other charge for delivery of cement to trucks at their mill.

5. With respect to paragraph Twelve (b) of the findings, your petitioners assign as error the failure of the Commission to find that none of your petitioners ever adopted or pursued any specific policy with respect to preventing the diversion of their cement in transit.

6. With respect to paragraph Twelve (d) of the findings, your petitioners assign as error the failure of the Commission to find that none of your petitioners ever used the bill of lading stamp referred to in said subparagraph (d).

7. With respect to paragraph Fourteen (e) of the findings, your petitioners assign as error the failure of the Commission to find that none of your petitioners ever adopted or followed the action of the Lehigh Company referred to in said subparagraph (e).

8. With respect to paragraph Seventeen (b) of the findings, your petitioner, Spokane Portland Cement Company, assigns as error the failure of the Commission to find that this petitioner never adopted or published a definition of a dealer.

9. With respect to paragraph Nineteen (a) of the findings, your petitioners assign as error the failure of the Commission to find that there is no evidence in the record as to whether or not any of your petitioners ever sold their cement in competition with imported cement or whether any of your petitioners ever had any policy or practice with respect thereto and that there is no support

in the record or in the findings for the order directed against petitioners on this subject.

10. With respect to paragraph One (31) of the findings, your petitioner, Spokane Portland Cement Company, assigns as error the failure of the Commission to find that none of the acts alleged in the Complaint and found in the findings to have been done by this petitioner were done by it and that if done were done by another corporation, and that the Complaint of the Federal Trade Commission should be dismissed as to this petitioner.

Dated, March 15, 1944.

Respectfully submitted,
Chickering & Gregory,
By Walter C. Fox, Jr.,
111 Sutter Street,
San Francisco, Cal.
Counsel for Calaveras Cement Company.

Pillsbury, Madison & Sutro,
By Marshall P. Madison,
Standard Oil Bldg.,
San Francisco, Cal.
Counsel for Pacific Portland Cement Company.

Morrison, Hohfeld, Foerster,
Shuman & Clark,
By Herbert W. Clark
Crocker Building,
San Francisco, Cal.
Counsel for Santa Cruz Portland Cement Company.

Witherspoon & Witherspoon,
By A. W. Witherspoon,
Peyton Building,
Spokane, Wash.,
Counsel for Spokane Portland Cement Company.

Earl, Hall & Gerdes,
By Chaffee E. Hall,
215 Market St.,
San Francisco, Cal.,
Counsel for Yosemite Portland Cement Corporation.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

(Caption—8373)

STATEMENT OF POINTS UPON WHICH PETITIONER HURON PORTLAND CEMENT COMPANY INTENDS TO RELY.

(Filed Mar. 20, 1944, Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Petitioner Huron Portland Cement Company, having duly filed with this Court its petition (Cause No. 8373) to review and set aside an Order to Cease and Desist of the Federal Trade Commission (hereinafter called the Commission), made and entered on the 17th day of July, 1943, now makes and files its Statement of Points setting out the assignments of errors which this petitioner intends to urge and rely upon in support of its said petition, as follows:

I. The Commission erred in its Order and Findings in the several particulars set forth in the "Statement of Points Upon Which Petitioners Intend to Rely" filed by the petitioners in Aetna Portland Cement Company, et al. *vs.* Federal Trade Commission (Case No. 8360); The Cement Institute, et al. *vs.* Federal Trade Commission (Case No. 8361); Blaine S. Smith, et al. *vs.* Federal Trade Commission (Case No. 8410), this petitioner adopting as its own each and all of the points and assignments of error there set forth.

II. The Commission erred also in the following respects:

1. In making and entering the Order against petitioner for the reason that there is no finding by the Commission:

(a) that petitioner was a member of, and did not maintain or join in maintaining and having in effect any combination to hinder, lessen, restrict, and restrain competition in the price of cement as recited in Paragraph Four of said Complaint;

(b) that petitioner was a party to, or had maintained or participated in maintaining, any mutual understanding or agreement to employ any of the methods and practices recited in the Complaint of the Federal Trade Commission (Paragraphs Five to Seven inclusive of Count I thereof);

(c) that petitioner employed any of said methods and

practices referred to in subdivision (b) above, either by itself, or in conjunction with, or by reason of an understanding between it and the other respondents in the Complaint of the Federal Trade Commission or any of them;

(d) that petitioner has cooperatively employed what is known as a multiple basing point system (Complaint, Count I, Paragraph Five (a));

(e) that petitioner in pursuance of and in support of any such combination made use of the so-called rate books (Complaint, Count I, Paragraph Seven (a));

(f) that petitioner resorted to any means to prevent the use of trucks for the delivery of cement (Complaint, Count I, Paragraph Seven (b));

(g) that petitioner took or joined in cooperative measures to eliminate diversions of shipments of cement in transit (Complaint, Count I, Paragraph Seven (c));

(h) that petitioner has, itself, thwarted, or joined in any cooperative movement to thwart, the efforts of Government officials to secure f.o.b. mill prices on cement (Complaint, Count I, Paragraph Seven (d));

(i) that petitioner joined in any effort, movement or activity to obtain, during the period of the National Recovery Act, approval of a code provision which would require a division of customers into classes (Complaint, Count I, Paragraph Seven (e));

(j) that petitioner entered into any understanding whereby it limited sales to those who fall within any agreed or arbitrary definition of a cement dealer (Complaint, Count I, Paragraph Seven (f));

(k) that petitioner's terms of sales and discounts are uniform with all other respondents and that they are the result of a mutual understanding and concert of action between it and other respondents (Complaint, Count I, Paragraph Seven (g));

(l) that petitioner has taken any steps whatever or done any acts to prevent price competition in cement resulting from importation of foreign cement (Complaint, Count I, Paragraph Seven (h));

(m) that petitioner referred questions of policy to the Cement Institute or any office thereof or joined in meetings of the Institute or any group thereof to promote any system of pricing (Complaint, Count I, Paragraph Seven (i));

(n) that petitioner joined in any united action to dis-

guise in any way any combination or to allay public suspicion or criticism or caused or joined in causing any advertisements making false representations as to any method of pricing cement (Complaint, Count I, Paragraph Seven (j)).

2. In making and entering the Order against petitioner, for the reason that there is no substantial evidence in the record to support a finding or findings that petitioner participated in, practiced or had any understanding with other of said respondents, named in the Complaint of the Commission, in respect to participating in or practicing any of the several methods, practices, acts or activities described and detailed in II, 1, (a) to (n) above.

3. In making and entering the Order against this petitioner, for the reason that there is no finding that petitioner had at any time entered into, continued, cooperated or carried on any planned course of action, understanding, agreement, combination or conspiracy with any other respondent named in the Complaint of the Commission, to do and perform any of the things described and set forth in Paragraph 1 of the Order of the Commission.

4. In making and entering the Order against this petitioner, for the reason that there is no finding that petitioner, in connection with or in aid or support of any plan, system, acts or practices described in Paragraph 1 of said Order, has done or cooperated with other respondents named in the Complaint of the Commission, in doing any of the acts described in subdivision (a) to (p) inclusive of Paragraph 2 of the Order of the Commission.

5. In making and entering the Order against this petitioner, for the reason that there is no substantial evidence in the record on which a finding could be made that petitioner was a party to any combination as charged in the Complaint.

6. In making and entering the Order against this petitioner for the reason that there is no substantial evidence in the record on which a finding could be made that petitioner has done or cooperated with any other respondents named in the Complaint of the Commission, in doing, in connection with any combination, understanding or agreement with said other respondents any of the acts or practices described in Paragraphs Five to Seven inclusive of the Complaint and in Subdivisions (a) to (p) inclusive of Paragraph Two of said Order.

7. In making and entering the Order against the petitioner, particularly Paragraph 3 thereof, for the reasons that:

(a) The record contains no finding and no substantial evidence on which a finding could be based that this petitioner discriminated in price between its customers in the manner and by the means described in said Paragraph 3;

(b) As a matter of law, the charge of discrimination as between customers cannot be predicated upon the net recovery of the seller at its plant. It can exist only in and can be predicated only on the price at which the cement is sold, *i.e.*, the price which the customer pays.

III. The Commission erred in overruling and denying petitioner's motion that the Complaint of the Commission be dismissed as to this petitioner.

IV. The Commission erred in accepting, and adopting in substance in its Findings, the Trial Examiner's Report Upon the Evidence, in overruling the exceptions in writing thereto filed on behalf of this petitioner, and in failing to make findings of the material facts as set forth in said exceptions of this petitioner.

V. The Commission erred in accepting and adopting in substance in its Findings, the Trial Examiner's Report Upon the Evidence, such Report not having reported specifically as to the evidence or the lack of evidence in respect to this petitioner and its relation to the issues raised by the pleadings and not having made any report with respect to whether or not this petitioner was connected by the evidence with any of the allegations of the Complaint.

Respectfully sumitted,
Hal H. Smith,
Attorney for Petitioner,
Huron Portland Cement Company.
Address: 11th floor Ford Bldg.,
Detroit 26, Michigan.

Dated: Detroit, Michigan.
March 7, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS,
For the Seventh Circuit.
* * (Caption—8386) * *

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY.

(Filed Mar. 17, 1944, Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioner, Superior Portland Cement, Inc., of Seattle, Washington, having duly filed with this Court its petition to review and to set aside an order to cease and desist of the Federal Trade Commission, hereinafter called the "Commission", made and entered on the 17th day of July, 1943, now pursuant to the orders of this Court duly made and entered on the 28th day of August, 1943, and the 17th day of December, 1943, does make and file the following Statement of Points, setting out the assignments of errors which it intends to allege and rely upon in support of its said petition:

I.

(1) As is permitted by the above mentioned orders of this court, petitioner does hereby by reference adopt as fully as though set forth at length herein, each and every point stated in the Statement of Points filed by each and every petitioner in the following cases in this court brought to review the same order of the Federal Trade Commission as is involved herein:

Aetna Portland Cement Company, a corporation, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8360;

The Cement Institute, an unincorporated association, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8361;

Blaine S. Smith, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8410;

Riverside Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8393;

Marquette Cement Manufacturing Company, a corpora-

tion, petitioner, *vs.* Federal Trade Commission, respondent, No. 8371;

Calaveras Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8372;

Northwestern Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8389;

Huron Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8373;

California Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8402; and

Universal Atlas Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8399.

In addition to the points so adopted by reference, petitioner intends to rely on the following points:

II.

The Commission had no jurisdiction to entertain any proceedings or enter any order against petitioner for the reasons that:

(2) Petitioner is not engaged in commerce with foreign nations or among the several states or with the Indian tribes, as set forth in Art. 1, Sec. 8 of the Constitution of the United States.

(3) There is no evidence that petitioner ever entered into any agreement, combination or conspiracy with any other respondent before the Commission, or any other person to fix prices, lessen competition, create monoply or restrain trade in interstate commerce.

(4) There is no evidence that petitioner acting either individually or in combination with any other person, has ever at any time discriminated in price between customers in interstate commerce or used at any time any unfair method of competition in interstate commerce.

(5) The findings of fact affirmatively establish that petitioner did not cause cement to be shipped and transported from the various points of its production in certain respective states through and into other states of the United States, and the charges contained in both counts of the complaint deal solely with cement so shipped.

III.

The Commission erred in making and entering its order to cease and desist against petitioner, as follows:

(6) The order to cease and desist is invalid and unlawful for the reason that petitioner did not receive a hearing before a fair and impartial tribunal as is required by the due-process clause of the Fifth Amendment.

(7) The order to cease and desist is erroneous and unlawful and exceeds the jurisdiction of the Commission in that it enjoins methods of competition and acts and practices which are not specified in the complaint and are not within the issues raised by the pleadings, as follows:

(a) The order enjoins acts and practices dealing with "interstate commerce" which might include sales to Alaska, whereas the complaint covers only acts and practices relating to sales of cement shipped from the point of its production in certain states through and into other states of the United States.

(b) The order enjoins quoting or selling at f.o.b. mill prices which are systematically equivalent to delivered prices of other mills, as to which there are no charges in the complaint.

(8) The order to cease and desist against petitioner is not supported by the findings of fact, as follows:

(a) Concerning petitioner, the Commission found only that it is located in Seattle, Washington, with plants at Seattle and Concrete, Washington, the former of which is leased; that it became a member of The Cement Institute in June, 1933, and that with few exceptions it makes sales and shipments outside the state of Washington only to Alaska. The Commission further found that the multiple basing point delivered price system was extended to Western Washington in 1931, and that its introduction there followed a price war which commenced when two new mills began operating in that territory, one in 1928 and the other in 1929, and was approximately coincident with the leasing of one of these new mills by petitioner. These findings of fact do not support any of the charges of the complaint and do not support the order to cease and desist.

(b) The numerous findings of fact employing merely the word "respondents" without naming petitioner, and often without naming any company whatsoever, are so vague and indefinite, insofar as their application to peti-

tioner is concerned, that they do not support the order to cease and desist against petitioner.

(c) There are no findings of fact establishing that petitioner agreed or conspired with, or had any understanding with, any other respondent concerning the prices or marketing practices either of petitioner or such other respondent, nor are there any findings establishing that petitioner has discriminated in price between different purchasers in interstate commerce.

(d) The purported findings of fact are not proper findings of fact as are contemplated by the Federal Trade Commission Act and are therefore unlawful, void and ineffective and cannot support the order to cease and desist because the findings of fact are contrary to the evidence and were not made as a result of a fair and impartial consideration of the evidence in the case but were predetermined, were based on the biased, prejudiced and erroneous conclusions arrived at by the members of the Commission prior to the commencement of this action, and ignored the uncontradicted evidence in the record establishing petitioner's marketing practices.

(e) The purported findings of fact are so vague and indefinite as to be invalid and unlawful because they do not specify which of the findings are and which are not applicable to petitioner.

(9) The order to cease and desist against petitioner is unlawful and invalid and should be set aside because there is no substantial evidence in the record to establish the charges in the complaint as against petitioner, and in particular there is no substantial evidence establishing:

(a) That petitioner has maintained a combination with any other respondent before the Commission to hinder, lessen, restrict or restrain competition in price among cement producers in the course of commerce between the states of the United States, nor

(b) That petitioner has discriminated in price among any customers in interstate commerce.

(10) The order to cease and desist against petitioner is invalid and unlawful and should be set aside because it is so vague and indefinite as not to provide or constitute a standard of conduct by which petitioner can reasonably be required to be governed in the conduct of its affairs, in that the order enjoins any planned, common course of action in quoting or selling cement at prices determined pur-

suant to the multiple basing point delivered price system without any definition of what constitutes that system or wherein it differs from other delivered price systems.

IV.

The Commission erred in making its findings as to the facts and conclusions as follows:

(11) The findings of fact do not comply with the requirements of due process of law nor are they findings of fact as are contemplated by the Federal Trade Commission Act, for the reason that they are contrary to the evidence and were not made as a result of a fair and impartial consideration of the evidence in the case, but were predetermined and are based on the biased, prejudiced and erroneous conclusions arrived at by the members of the Commission prior to the commencement of the case, and ignore the uncontradicted evidence in the record establishing petitioner's market practices.

(12) The findings of fact wherein petitioner is not named but wherein the word "respondents" or like terms are used, in many instances on their face are not applicable to petitioner and in all instances are too vague and ambiguous insofar as their application to petitioner is concerned to be valid findings of fact.

(13) In paragraph 1 of the Findings:

(a) The Commission erred in subparagraph (3o) in failing to find that petitioner joined the Institute during the period of national emergency solely for the purpose of supporting the National Industrial Recovery Act by participating in the formulation and administration of the N.R.A. Code for the Portland Cement Industry.

(14) In paragraph 2:

(a) The Commission's finding that petitioner makes sales and shipments to Alaska is not supported by any evidence.

(b) The Commission erred in failing to find that petitioner in the regular course of its business sells and ships cement from its plants in the state of Washington only to delivery points in the state of Washington and that it does not ship cement to any other state of the United States.

(c) The finding that respondents have maintained a course of commerce between the states of the United States is not supported by any evidence as to petitioner.

(15) In paragraph 4:

(a) The inference that by reason of the lease by petitioner of the plant of Pacific Coast Cement Co. there existed an interrelationship between corporate respondents is not supported by any evidence.

(b) The Commission erred in failing to find that none of the facts set forth in paragraph 4 other than those dealing with the lease of the plant of Pacific Coast Cement Co. have any application to petitioner and that there is no concentration of control of the industry in the state of Washington, either directly or through interrelationship, and that no uniformity of purpose has been maintained therein. The Commission should have found that there is no leadership in the industry in the state of Washington, and erred in failing to so find.

(c) The Commission erred in failing to find that petitioner used The Cement Institute only for the purpose of receiving general trade information and for no other purpose whatsoever.

(16) In paragraph 5:

(a) The Commission erred in failing to find that petitioner never was a member nor had any connection with nor attended any meetings of the Association of American Portland Cement Manufacturers, The Association of Licensed Cement Manufacturers, or the Cement Manufacturers Protective Association.

(b) The Commission erred in failing to find that petitioner did not join The Cement Institute until June, 1933, and then joined only in order to participate in the preparation and submission of a code of fair competition pursuant to the provisions of The National Industrial Recovery Act.

(17) In paragraph 6:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner has not entered into any understanding or agreement for uniformity of action and that petitioner has not participated in any collective action with regard to marketing practices except as was initiated or required by the National Industrial Recovery Act and the codes of fair competition adopted thereunder.

(c) The Commission erred in failing to find that the marketing practices of petitioner have been adopted independently to meet competitive conditions and are chosen solely with the view of achieving for petitioner the best competitive position possible.

(d) The Commission erred in failing to find that petitioner for at least twenty-seven years prior to this proceeding made secret prices below quoted prices and that a considerable volume of its sales was made on these lower prices.

(18) In paragraph 7:

(a) The findings in subparagraphs (a) to (m) inclusive and (o) to (r) inclusive are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The finding in subparagraph (a) that in determining the delivered price at any given location, respondents use a multiple basing point system is, as to petitioner, not supported by the evidence.

(c) The Commission erred in subparagraph (a) in failing to find that petitioner establishes delivered prices which will get business for it, irrespective of their relationship with maximum mill nets of any plant; that in substantial portions of its marketing area these prices often differ from those currently being quoted at the same delivery point by other producers; that in other substantial portions of its marketing area it competes in price with cement trucked in from the state of Oregon, and that throughout its marketing area it competes in price with cement shipped in by water and rail from Oregon and California mills.

(d) The Commission erred in failing to find that prior to 1929 petitioner sold f.o.b. mill exclusively; that a new competing mill, the Northwestern Portland Cement Co., was established in western Washington in 1928; that petitioner found this new mill quoting to petitioner's customers delivered prices which differed from the cost to the customers of petitioner's f.o.b. mill price plus freight, and that in order to meet this competition, petitioner commenced and has continued quoting delivered prices to its commercial customers.

(e) The Commission erred in failing to find that petitioner adopted and uses delivered prices, not for the purpose of restraining competition through a so-called "mul-

tiple basing point system," but for the purpose of meeting and engaging in price competition with other cement plants in western Washington.

(f) The Commission erred in failing to find that petitioner has at all times continuously and uniformly submitted f.o.b. mill bids to the Government except when complying with the N.R.A. Code.

(g) The Commission erred in failing to find that there has never been any understanding or agreement between petitioner and any other respondent with reference either to the adoption or to the continuance of any pricing method or any marketing practice.

(h) The Commission erred in subparagraph (i) in failing to find that petitioner never was a member of the Association of American Portland Cement Manufacturers nor of the Association of Licensed Cement Manufacturers and attended none of the meetings therein mentioned.

(i) The Commission erred in failing to find that petitioner never adopted or used the so-called code of ethics of the Institute and that the marketing practices of petitioner differ in substantial respects from those set out in said code of ethics.

(j) The Commission erred in subparagraph (j) in failing to find that petitioner was never a member of the so-called "license agreement."

(k) The Commission erred in failing to find that petitioner never agreed to the so-called compendium of established terms and marketing methods of the Portland Cement Industry and that the marketing practices of petitioner have always been different in substantial respects from those set out in said compendium.

(l) The Commission erred in failing to find that petitioner did not employ the multiple basing point system of delivered prices at the time N.R.A. code was adopted nor at any other time.

(m) The inference in subparagraph (l) that petitioner adopted a basing point system of pricing and that its pricing methods are not the result of independent action is not supported by the evidence.

(n) The findings in paragraph (n) are not supported by the evidence. The Commission erred in failing to find that petitioner changed from f.o.b. mill prices to delivered prices several years prior to the leasing of the Pacific Coast Cement Co. mill and that the change had no relation-

ship to the mill later leased but was necessary in order to engage successfully in competition with a third mill which was quoting delivered prices.

(19) In paragraph 8:

(a) The findings in paragraph 8 are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner did not receive or give out freight rate information of any kind, either commercial rates or land grant rates, and that, in particular, petitioner received no freight rate information from the Cement Institute, the Pacific Coast Cement Institute, nor any co-respondent.

(c) The Commission erred in failing to find that petitioner did not publish, circulate or exchange price lists.

(20) In paragraph 9:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner constantly made non-identical bids.

(21) In paragraph 10:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(22) In paragraph 11:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner never refused to permit trucking of cement from its plants and that while petitioner imposed a 10¢ per barrel differential thereon, this was not as the result of any agreement or understanding with any other company, but was for the reason that the company's two plants were designed for railroad deliveries and trucking caused considerable delay and expense to petitioner.

(23) In paragraph 12:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred

in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner never entered into any agreement or understanding, either oral or in writing, with any other respondent or any other company or any railroad with reference to the diversion of shipments in transit, and further erred in failing to find that petitioner never employed the non-diversion stamp and that the only reason for the inclusion in petitioner's contracts of a provision against diversion was to protect its regularly established and recognized dealers in their home trade areas.

(24) In paragraph 13:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner had no relationship with any contract checking or cancellation activities of the Institute and did not either furnish such information to or receive such information from the Institute.

(c) The Commission erred in failing to find that petitioner was not a member of the Institute prior to June, 1933, and did not subscribe to the compendium of established terms and marketing methods.

(25) In paragraph 14:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that the terms and conditions of sale utilized by petitioner were at all times substantially different from those of the other respondents and were adopted and changed from time to time by petitioner in accordance with its own desires and its own independent judgment and for reasons based solely on its own business affairs, without any agreement, express or implied, with any other company.

(c) The Commission erred in failing to find that petitioner did not follow the action of Lehigh set out in subparagraph (e) of paragraph 14.

(d) The Commission erred in failing to find that petitioner was never a member of the Association of Ameri-

can Portland Cement Manufacturers and attended none of its meetings, that petitioner never subscribed to the code of ethics, and that petitioner never subscribed to the compendium of established terms and marketing methods.

(26) In paragraph 15:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner was not a member of the Association of American Portland Cement Manufacturers and did not attend any meetings of that organization, that there is no showing that petitioner ever subscribed for or received the Mallory Statistical Service, that petitioner was not a member of the Cement Institute prior to June, 1933, and that petitioner never furnished Mallory or the Institute any production data.

(27) In paragraph 16:

(a) The findings in this paragraph are not supported, as to the petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(28) In paragraph 17:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, except to the extent that petitioner operated under the N.R.A. code.

(b) The commission erred in failing to find that petitioner was never a member of the Association of American Portland Cement Manufacturers.

(c) The Commission erred in failing to find that petitioner, except when complying with the Code, did not follow any rigid rule with respect to the definition of a dealer and that petitioner sold on the same basis as dealers to many different kinds of business enterprises not ordinarily considered dealers.

(29) In paragraph 18:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(30) In paragraph 19:

(a) The findings in this paragraph are not supported,

as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(31) In pargraph 20:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner was never a member of the Association of American Portland Cement Manufacturers and that it never subscribed to the code of ethics of the Cement Institute.

(c) The Commission erred in failing to find that petitioner sells cement of several different specifications and that petitioner has never had any understanding or agreement with any other respondent to sell cement of only some particular specification.

(32) In paragraph 21:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(33) In paragraph 22:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that the hypothetical questions asked by the Commission to its various expert witnesses presented a state of facts materially different from the facts of petitioner's marketing and pricing practices as shown in the record in this case and that, consequently, the testimony of these experts was not applicable to petitioner.

(34) In paragraph 23:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner does not use the multiple basing point delivered price system.

(35) In paragraph 24:

(a) The findings in this paragraph are not supported, as to petitioner, by the evidence, and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(b) The Commission erred in failing to find that petitioner has not discriminated in price between customers.

(36) In paragraph 25:

(a) The conclusions and findings are not supported, as to petitioner, by the evidence or by the findings.

(b) The Commission erred in failing to find that the Clayton Act has no application to petitioner because petitioner does not sell outside the State of Washington and because sales in the State destined for Alaska are all at the same price.

(37) In paragraph 26:

(a) The conclusions and findings are not supported, as to petitioner, by the evidence.

(b) The Commission erred in failing to find that petitioner was not a party to any combination to hinder, lessen, restrain or suppress competition in the sale of cement or for any other purpose, and further in failing to find that petitioner did not sell or distribute cement among and between the several states of the United States.

(38) The "Conclusion" of the Commission is not supported, as to petitioner, by the evidence or the findings and is contrary to law.

V.

The Commission erred in denying the following motions:

(39) Objections and motions by petitioner directed at certain evidence (Resp. Exh. 392) filed by petitioner on June 21, 1939.

(40) Motion to dismiss complaint filed by petitioner on September 5, 1939, and made orally before the Commission on June 29, 1939.

VI.

The Commission erred in affirming the rulings of the Trial Examiner on the reception and rejection of evidence and in other particulars in respect of the proceedings herein apparent of record as follows:

(41) Denial of offer to prove by witness Percy I.

Taylor that petitioner made f.o.b. mill bids to Bureau of Reclamation on June 13, 1938, and April 26, 1939.

(42) Denial of offer to prove by witness Admiral Peoples a number of f.o.b. mill bids by petitioner subsequent to Admiral People's testimony as a witness for the Commission.

(43) Denial of offer to prove by witness Fry that during the period covered by his testimony on behalf of the Commission petitioner constantly bid f.o.b. mill to the branches of the United States Department of Interior.

(44) The receiving of files of petitioner on subpoena duces tecum and turning them over to counsel for the Commission and thereafter admitting into evidence many of the documents contained therein, all without any determination of competency, relevancy or materiality and all over the objection of petitioner.

Dated March 15, 1944.

Respectfully submitted.

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Of Little, Leader, LeSourd & Palmer,
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Attorneys for Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

* * (Caption—8389) * *

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY.

(Filed Mar. 20, 1944. Kenneth J. Carrick, Clerk.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, Northwestern Portland Cement Company, of Seattle, Washington, a Washington corporation, having duly filed with this Court its Petition to Review and Set Aside an Order to Cease and Desist of the Federal Trade Commission (hereinafter called the Commission) made and entered on the 17th day of July, 1943, now, pursuant to the Orders of this Court heretofore duly made

and entered, does hereby make and file the following Statement of Points, setting out the assignments of errors which it intends to urge and rely upon in support of its said Petition:

I.

(1) In accordance with the order of this Court authorizing it so to do, petitioner hereby adopts, and by reference thereto incorporates herein as fully as though set forth herein, each and every point contained in the Statements of Points filed by each and every petitioner in the following cases now pending in this Court brought to review the Order of the Federal Trade Commission which is involved herein:

Aetna Portland Cement Company, a corporation, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8360;

The Cement Institute, an unincorporated association, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8361;

Marquette Cement Manufacturing Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8371;

Calaveras Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8372;

Huron Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8373;

Riverside Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8393;

Superior Portland Cement, Inc., a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8386;

Universal Atlas Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8399;

California Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8402; and

Blaine S. Smith, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8410.

(2) In addition to the points so adopted by reference, petitioner intends to rely upon the following points:

II.

The Commission had no jurisdiction over petitioner and lacked jurisdiction to entertain any proceedings or enter any order against petitioner for the following reasons:

(3) Petitioner "makes no sales or shipments outside the State of Washington" and is in no manner engaged in interstate commerce.

(4) There is no evidence that petitioner ever entered into any agreement, combination, or conspiracy with any other respondent before the Commission, or any other person, to fix prices, lessen competition, create monopoly or restrain trade in interstate commerce.

(5) There is no evidence that petitioner, acting either individually or in combination with any other person, has ever discriminated in price between customers in interstate commerce or at any time used any unfair method of competition therein.

III.

The Commission erred in making and entering its order to cease and desist herein, as follows:

(6) The order is unlawful and exceeds the jurisdiction of the Commission in that it abridges and nullifies petitioner's constitutional right to meet competition, in violation of the Fifth Amendment to the Constitution of the United States, and unlawfully usurps the legislative functions and powers of Congress by limiting and prescribing beyond the Commission's power the methods of competition which petitioners may employ and enjoining, prescribing and fettering the petitioner's right to engage in free and fair competition.

(7) The order to cease and desist is unlawful and exceeds the jurisdiction of the Commission in that it enjoins methods of competition and acts and practices which are not specified in the Complaint, are not within the issues raised by the pleadings, and in no manner are a part of or connected with interstate commerce.

(8) The order to cease and desist is unlawful in that there is no evidence that petitioner ever entered into, continued, cooperated in or carried out any planned common course of action, understanding, agreement, combina-

tion or conspiracy, or threatened so to do, with respect to doing or performing any of the acts and things prohibited by the Federal Trade Commission Act or the Clayton Act.

(9) The order to cease and desist is unlawful and exceeds the juridiction of the Commission in that it is so vague and indefinite as not to provide or constitute a standard of conduct by which petitioner can reasonably expect to be governed in the conduct of its affairs.

(10) The order to cease and desist against petitioner is not supported by the Findings of Fact since

(a) The Commission specifically found that petitioner makes no sales or shipments outside the State of Washington;

(b) The Commission makes no substantial findings against this petitioner and its order against it is based upon generalizations drawn from testimony referring to respondents generally, without indicating that this petitioner is at all involved;

(c) The findings do not establish that petitioner ever agreed, conspired, or had any understanding with any other respondent or any other person concerning the practices forebidden by the order.

(d) The Findings are too vague and fail to establish that petitioner is affected by them.

(e) There is no substantial evidence on any issues raised by the Complaint to support any findings against petitioner before the Commission.

(f) There is no evidence that petitioner's practices or methods of sale or of doing business have been unfair or injurious to any competitors, class of competitors or class of persons competing with petitioner, or detrimental or injurious to, or against the interests of the public.

(10) The order generally is not supported by the Findings of Fact and Conclusions of Law of the Commission.

IV.

The Commission erred in making its Findings as to the facts and conclusions as follows:

(11) The Findings of Fact are not supported by the evidence and are improper in form and substance and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of findings as to the facts

provided for by law and upon which any order herein may be based.

(12) The Findings of Fact are too indefinite and do not indicate wherein petitioner is connected by the evidence with any of the material findings, and are in effect an attempt to blanket all respondents by the use of that term without specifying wherein individual respondents, and in particular, petitioner, are involved.

(13) The Findings, insofar as they infer that petitioner has entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or intended to do so, or has done any of the things found to be done by any of the petitioners in support thereof or pursuant thereto, are not supported by the evidence.

(14) The findings are based upon evidence improperly admitted.

(15) With respect to Paragraph Five:

(a) The Commission erred in failing to find that petitioner has no relationship with any other respondent, corporate or individual.

(b) The Commission erred in failing to find that petitioner has no relationship with any other company and has not aided in creating or maintaining any unity of purpose of any sort.

(c) The Commission erred in failing to find that petitioner joined the Cement Institute during a period of national emergency solely for the purpose of supporting the National Recovery Act under the NRA Code.

(d) The Commission erred in failing to find that petitioner was never a member of the Association of American Portland Cement Manufacturers, or of the Association of Licensed Cement Manufacturers, or of the Cement Manufacturers Protective Association.

(16) With reference to Paragraph Six:

(a) The Commission erred in failing to find that the evidence fails to disclose any cooperative activity on the part of petitioner with any cement producers.

(b) There is no evidence to support any statement that petitioner believes that free and open competition is impractical or that it is possessed of the philosophy of seeking not to excell others in quality, price or terms.

(c) The Commission erred in failing to find that peti-

tioner has adopted any independent practices and has competed fairly.

(17) With reference to Paragraph Seven:

(a) The Commission erred in subparagraph (a) in failing to find that petitioner has engaged in many sales on the basis of f.o.b. mill price.

(b) The evidence does not support any finding that petitioner uses any multiple basing point system.

(c) The evidence does not support any finding that petitioner maintains arbitrary variances with respect to basing points.

(d) The Commission erred in failing to find that there has never been any understanding or agreement between petitioner and any other respondent with reference either to the adoption or continuance of any pricing method or marketing practice.

(e) In subparagraph (i) the statement is made that "Numbers of the respondents . . . were members of" the Association of American Portland Cement Manufacturers. The resulting inference that petitioner is a member is not supported by the evidence and the Commission erred in failing to specifically find that petitioner was not a member of the Association and had no connection of any sort with it.

(f) The Commission erred in failing to find that petitioner never adopted or used the so-called Code of Ethics of the Institute.

(g) The Commission erred in failing to find that petitioner at no time had a connection of any sort with the so-called "License Agreement" referred to in subparagraph (j).

(h) The findings in subparagraphs (m) and (n), insofar as they imply the use of a "multiple basing point delivered-price system" or the "extension" thereof by petitioner, are not supported by the evidence.

(i) The Commission erred in failing to find that petitioner at no time "made use of the so-called 'compendium'."

(j) The Commission erred in failing to find specifically that petitioner never made use of the sales contracts referred to.

(k) The generalization that petitioners refused to submit f.o.b. mill price bids to the Government is without foundation insofar as petitioner is concerned, and the

Commission erred in not finding that petitioner in fact made many such bids.

(18) With reference to Paragraph Eight:

(a) There is no evidence to support any finding contained in Paragraph 8 against this petitioner.

(b) The Commission erred in failing to specifically find that petitioner at no time disseminated any freight rate information or either published or made use of any freight rate book.

(c) The Commission erred in failing to find specifically that no freight rate book has ever been published or distributed for the State of Washington by the Institute or any other association.

(d) There is no evidence to support any findings against this petitioner that it ever exchanged land grant rate information with any other petitioner or cement company.

(e) There is no evidence to support any finding that the Institute ever disseminated any land grant rates or provided common freight factors on government business to petitioner.

(f) The evidence specifically shows that petitioner was never a member of the Pacific Coast Cement Institute and the Commission erred in failing to so find.

(g) The evidence shows that no Washington companies ever exchanged price lists among themselves and the Commission erred in failing to so find and to find that petitioner never published any price list.

(19) With reference to Paragraph Nine:

(a) There is no evidence to show any connection between petitioner and any of the practices found in Paragraph Nine and the Commission erred in failing to so find.

(20) With reference to Paragraph Ten:

(a) There is no evidence to connect petitioner with any of the matters found in this paragraph and the Commission erred in failing to so find.

(21) With reference to Paragraph Eleven:

(a) The Commission erred in failing to find that petitioner at no time made the additional charge of fifteen cents per barrel alleged for delivery to trucks at the mill.

(b) The Commission erred in failing to find that petitioner did not take any of the steps therein set forth concerning or affecting or opposing trucking cement, and did not refuse to permit trucking of cement from its plant.

(22) With reference to Paragraph Twelve:

(a) The findings in this paragraph are not supported by any evidence insofar as petitioner is concerned.

(b) The Commission erred in failing to find that petitioner never followed the "Code of Ethics" or "Compendium" referred to.

(c) The Commission erred in failing to find that petitioner at no time adopted or pursued any specific policy with respect to preventing the diversion of its cement in transit.

(23) With reference to Paragraph Thirteen:

(a) There is no evidence to support any of the findings contained in this paragraph insofar as petitioner is concerned, and the Commission erred in failing to so find.

(b) The Commission erred in failing to find that petitioner at no time used the "specific job contracts" in effect.

(c) The Commission erred in failing to find that petitioner never participated in any manner in any contract checking or cancellation activities of the Institute or any other association or group.

(d) The Commission erred in failing to find that petitioner did not become a member of the Institute until July, 1933.

(24) With reference to Paragraph Fourteen:

(a) The Commission erred in failing to make a specific finding that there is no evidence to connect petitioner with any of the findings set forth in this paragraph.

(b) The Commission erred in referring to the respondents generally in making its findings in this paragraph, since most of them referred to matters which happened long before the organization of petitioner.

(25) With reference to Paragraph Fifteen:

(a) The Commission erred in failing to find that petitioner is in no wise connected with the matters appearing in this paragraph.

(b) There is no evidence to support any findings or inference from any finding that petitioner ever participated in any plan to "divide available business."

(26) With reference to Paragraph Sixteen:

(a) The findings of this paragraph are not supported by any evidence as against this petitioner and the Commission erred in failing to find that the facts therein set forth have no application to petitioner.

(27) With reference to Paragraph Seventeen:

(a) The Commission erred in failing to find that there is no evidence to support any finding contained in said paragraph as against petitioner.

(b) The Commission erred in failing to find that petitioner at no time made use of the "dealer definition" referred to, or ever adopted or published it.

(c) The inference that petitioner was a member of the Portland Cement Association in 1919 by the statement that it was "largely composed of respondents herein" is not supported by the evidence as against petitioner, for it did not come into existence until long after that date.

(28) With reference to Paragraph Eighteen:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters appearing in this paragraph.

(29) With reference to Paragraph Nineteen:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters appearing in this paragraph.

(b) The Commission erred in failing to find that this petitioner never boycotted foreign cement.

(30) With reference to Paragraph Twenty:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters appearing in this paragraph.

(31) With reference to Paragraph Twenty-one:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters contained in this paragraph.

(b) The Commission erred in the constant reference to respondents generally, inferring that all respondents, including petitioner, participated in practices or matters found by the Commission when in fact there was no evidence to connect petitioner with such general finding.

(32) With reference to Paragraph Twenty-two:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters contained in this paragraph.

(33) With reference to Paragraph Twenty-three:

(a) The Commission erred in failing to find that Peti-

tioner is in no way connected with the matters appearing in this paragraph.

(34) With reference to Paragraph Twenty-four:

(a) The Commission erred in failing to find that Petitioner is in no way connected with the matters contained in this paragraph.

(b) The Commission erred in failing to find that petitioned did not submit any answers to the Clark-Burns Questionnaire.

(c) There is no evidence to support any finding that petitioner used the "multiple basing point delivered price system" and the Commission erred in failing to so find.

(35) With reference to Paragraph Twenty-five:

(a) There is no evidence to support a finding that the petitioner discriminated in mill nets among its various customers.

(b) The Commission erred in failing to find that any difference in prices quoted by petitioner were made in good faith to meet competition.

(36) With reference to Paragraph Twenty-six:

(a) There is no evidence that the Petitioner is in any way connected with the matters appearing in this paragraph and the Commission erred in not so finding.

(b) The general reference to respondents is not supported by the evidence insofar as this petitioner is concerned.

(c) The Commission erred in failing to find that this petitioner has not hindered, lessened, restrained or suppressed competition.

(d) The Commission erred in failing to find that petitioner at no time required agencies of the Federal Government to purchase their requirements through dealers at higher prices than were otherwise available.

(e) The Commission erred in failing to find that nothing done by this petitioner was in any wise connected with interstate commerce or the sale or delivery of cement therein.

V.—Conclusion.

(37) The Conclusion of the Commission is not supported by the evidence or by the findings and is contrary to law.

VI.

(38) The Commission erred in the reception and rejection of evidence and in other particulars in respect to the proceedings herein apparent of record.

(39) The Commission erred in affirming the rulings of the Trial Examiner excluding from evidence material offered on behalf of petitioner, including the following:

(a) Denial of offer to prove by the witness Percy I. Taylor that petitioner made f.o.b. mill bids to the Bureau of Reclamation on June 13, 1938 and April 26, 1939.

(b) Denial of offer to prove by the witness Admiral Peoples a number of f.o.b. mill bids by petitioner subsequent to Admiral People's testimony as a witness for the Commission.

(c) Denial of offer to prove by witness Mr. Fry that during the period covered by his testimony on behalf of the Commission petitioner constantly bid f.o.b. mill to the various agencies of the United States Department of Interior.

(39) The Commission erred in denying the objections and motions of petitioner directed at certain evidence filed on June 21, 1939.

(40) The Commission erred in denying petitioner's motions to dismiss the Complaint.

Dated at Seattle, Washington, March 17th, 1944.

Respectfully submitted,

S. Harold Shefelman,
Weter, Roberts & Shefelman,
1612 Northern Life Tower,
Seattle 1, Washington,
Attorneys for Petitioner Northwestern Portland Cement Company.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8393) * *

STATEMENT OF POINTS UPON WHICH PETITIONER RIVERSIDE CEMENT COMPANY INTENDS TO RELY.

Filed Mar. 16, 1944. Kenneth J. Carrick, Clerk.)

Petitioner Riverside Cement Company hereby specifies and states the following points upon which it intends to rely in support of its petition herein:

1. The Federal Trade Commission (hereinafter referred to as "the Commission") erred in making and entering its Order to Cease and Desist herein in each and all of the particulars specified by petitioners Aetna Portland Cement Company, et al., the Cement Institute, et al., and Blaine S. Smith, et al. (all of which said petitioners are hereinafter sometimes collectively referred to as petitioners Aetna, et al.) in the Statement of Points upon which said petitioners intend to rely in Cases Nos. 8360, 8361, and 8410 now pending before this Honorable Court, which said Statement of Points is hereby adopted *in toto* by this petitioner as supplemented by those certain further specifications hereinafter set forth.

2. The Commission erred in making its Findings as to the Facts and Conclusions in each and all of the particulars specified by petitioners Aetna, et al., in their aforesaid Statement of Points, in addition to which, however, this petitioner makes the following and further specifications:

a. With respect to Paragraph One, the Commission further erred in subparagraph (3g) in failing to find that this petitioner was incorporated in 1928; that it joined the Cement Institute during the period of national emergency solely for the purpose of supporting the National Industrial Recovery Act by participating in the formulation and administration of the NRA Code for the Portland Cement Industry; that since 1935 this petitioner has taken no part in any Cement Institute activity, and that it ceased to be a member of the Cement Institute as of November 1, 1939.

b. With respect to Paragraph Four, the Commission further erred in failing to find that this petitioner is neither owned or controlled by, or in any way affiliated with, or related to, any other cement company or group of cement companies.

c. With respect to Paragraph Five, the Commission further erred in failing to find that this petitioner was never a member of or had any connection with the Association of American Portland Cement Manufacturers, and that this petitioner was not in existence during the life of said Association; the statement in said paragraph regarding the Association of Licensed Cement Manufacturers is vague, inadequate and misleading, and the Commission further erred in failing to find that this petitioner was never a member of or had any connection with said Association, and that this petitioner was not in existence during the life of said Association; the findings in said paragraph regarding the Cement Manufacturers Protective Association are vague, indefinite and misleading and the Commission further erred in finding that this Association went out of existence in December, 1921, that this petitioner was never a member of or had any connection with said Association, and that this petitioner was not in existence during the life of said Association.

d. With respect to Paragraph Seven, the Commission further erred in failing to find (1) that this petitioner did not attend any of the meetings referred to in subparagraphs (i) and (k) thereof; (2) that it was not in existence during the time the same were held nor during the time referred to in subparagraph (j) thereof; and (3) that the use of any so-called "basing point system" or the practice of basing prices upon any so-called "basing point" ceased in the area within which this petitioner markets its cement not later than 1929.

e. With reference to Paragraph Eight, the Commission further erred in finding that the relationship between the Pacific Coast Cement Institute and The Cement Institute was close and in failing to find that this petitioner preferred to and did get its land-grant freight rate information direct from the railroads involved, and that it did not and does not utilize the so-called "control clause."

f. With reference to Paragraph Nine, the Commission further erred in failing to find that the instances set

forth in subparagraphs (b) and (c) do not correctly or at all illustrate marketing practices in the area within which this petitioner markets its cement and in failing to find that this petitioner at no time withdrew or corrected or sought to withdraw or to correct a bid or bids.

g. With reference to Paragraph Ten, the Commission further erred in failing to find (1) that the practice of imposing punitive bases was and is unknown in the area where this petitioner markets its cement, and (2) that neither this petitioner nor any other Pacific Coast cement company had anything to do with the so-called Cree-Lingeman incident.

h. With reference to Paragraph Eleven, the Commission further erred in failing to find that since the Code period this petitioner has sold cement f.o.b. mill without premium, and that as of 1940 92% of this petitioner's deliveries were made by truck.

i. With reference to Paragraph Thirteen; the Commission further erred in failing to find that this petitioner at no time participated or engaged in the checking of specific job contracts.

j. With reference to Paragraph Fourteen, the Commission further erred in that any implication in said paragraph contained to the effect that this petitioner was a party to any collective action to establish or to maintain uniformity of terms or conditions of sale is without support in the evidence; and the Commission further erred in considering, as against this petitioner, any activities occurring prior to its organization in 1928.

k. With reference to Paragraph Fifteen, the Commission further erred in that any implication in said paragraph contained to the effect that this petitioner was a party to any of the activities referred to in said paragraph is without support in the evidence; and the Commission further erred in considering, as against this petitioner, any activities occurring prior to its organization in 1928.

l. With reference to Paragraph Sixteen, the Commission further erred in that any finding or implication in said paragraph contained to the effect that this petitioner participated in any collective action of the nature referred to in said paragraph is without support in the evidence.

m. With reference to Paragraph Seventeen, the Commission further erred in considering, as against this peti-

tioner, any activities occurring prior to its organization in 1928.

n. With reference to Paragraph Eighteen, the Commission further erred in considering, as against this petitioner, any of the activities referred to in said paragraph.

o. With reference to Paragraph Nineteen, the Commission further erred in considering, as against this petitioner, any of the activities referred to in said paragraph.

p. With reference to Paragraph Twenty, the Commission further erred in considering, as against this petitioner, any of the activities referred to in said paragraph, including those occurring prior to its organization in 1928.

q. With reference to Paragraph Twenty-one, the Commission further erred in that any finding or implication in said paragraph contained to the effect that this petitioner engaged in any concerted course of action directed toward allaying criticism, if any, or seeking to convince the public of any fact or facts, is without support in the evidence, as is also the case with any gratuitous assumption or implication in said paragraph contained to the effect that there was collusion as between this petitioner and any other cement manufacturer or manufacturers.

r. With reference to Paragraph Twenty-two, the Commission further erred in considering, as against this petitioner, the expert testimony of economists based upon factual hypotheses which bore no resemblance to this petitioner's actual marketing and selling methods, either for the purpose of attempting to show that this petitioner was a participant in the combination alleged in the complaint, or for any other purpose.

s. With reference to Paragraph Twenty-three, the Commission further erred in considering, as against this petitioner, any of the matters in said paragraph referred to.

t. With reference to Paragraph Twenty-four, the Commission further erred in considering, as against this petitioner, any of the matters in said paragraph referred to; and in failing to find that there is no competition between dealers or other purchasers of cement at any given point to which petitioner ships in interstate commerce and dealers or other purchasers at any other point or points as to which there is a differential in freight rates from petitioner's shipping point in California.

u. The Commission further erred in failing to find (1) that this petitioner was not and is not a member of the

combination alleged in Paragraph Four and Count I of the complaint or of the combination and conspiracy referred to in Paragraph Eight of Count II of said complaint or of any combination or conspiracy; (2) that there is not, and has not been since 1929 any "governing basing point" or any "basing point" for any destination at which or to which this respondent has sold or does sell or ship cement; (3) that the quoting or charging of prices with reference to any formula of base price plus all-rail freight was abandoned by petitioner not later than 1929; (4) that petitioner has at no time, either in support of the combination referred to in Paragraph Seven of Count I of the complaint or in support of any combination, or cooperatively or as the result of planned or any concerted action or understanding by and between or with any other petitioner or cement company used or followed the means or practices referred to in said Paragraph Seven of said complaint or any thereof; and this petitioner states that any and all findings of the Commission, express or implied, to the contrary with reference to the foregoing facts or any thereof are without support in the evidence.

3. The Commission erred in the reception and rejection of evidence, and in other particulars in respect of the proceedings herein, apparent of record, in each and all of the particulars specified by petitioners Aetna, et al., in their Statement of Points mentioned above, in addition to which, however, this petitioner makes the following and further specifications:

a. The Commission further erred in receiving and considering, as against this petitioner, evidence of the acts and conduct of respondents below other than this petitioner in arriving at its purported determination that this petitioner was a party to the combination alleged in the complaint.

b. The Commission further erred in receiving and considering, for any purpose, as against this petitioner, evidence of the acts and conduct of respondents below and of other cement companies, trade associations and individuals occurring prior to the organization and incorporation of this petitioner in 1928.

c. The Commission further erred in receiving and considering, for any purpose as against this petitioner, the acts and conduct of members of The Cement Institute occurring prior to the date upon which this petitioner became a member thereof, to wit, June 15, 1933.

d. No proper foundation was laid for the admissibility or for the consideration, as against this petitioner, of any of the evidence specified in subparagraphs a, b, and c of this Specification No. 3, nor was the same or any thereof connected up in any manner so as to render it competent as against this petitioner.

e. The Commission further erred in receiving and considering and in drawing adverse inferences from the acts and conduct of this petitioner and of other respondents below during the period the Cement Code was issued and in effect within the meaning of Section 5 of the National Industrial Recovery Act; and in failing to find that this respondent did not, after the Code period, adhere to or follow the trade and marketing practices prescribed and followed during such period.

4. The Commission erred as to this petitioner in each and all of the particulars specified by petiteioners Aetna, et al., with reference to the denial of motions in Part IV of the Statement of Points of said petitioners.

5. This petitioner further specifies the following points upon which it also intends to rely:

a. The acts, declarations and conduct of respondents below, other than this petitioner, were neither admissible against nor should they have been considered as against this petitioner unless and until:

(1) The existence of the asserted combination had been shown by independent evidence; and

(2) The fact that this petitioner was a party to such asserted combination had been shown by proof of its own acts, declarations or conduct as distinguished from those other parties.

b. Neither of the foregoing elements were proven as against this petitioner and any findings, express or implied, to the contrary are without support in the evidence.

c. A finding of participation in any alleged combination or conspiracy must not only be based upon evidence relating to the activities of the party against whom such finding of participation is sought, but such evidence must unequivocally point to such participation.

(1) Disconnected circumstances, any one of which or all of which are equally consistent with a lawful undertaking, are insufficient either to establish a conspiracy or to prove participation therein.

d. This petitioner's activities under and in compliance

with the Cement Code was wholly incompetent to be considered as evidence of, or as evidence warranting an inference of, participation in an illegal combination.

e. The activities of the trade associations to which this petitioner belongs or has belonged have been repeatedly upheld as to legality by decisions of the Supreme Court.

f. Pricing patterns resulting from follow-the-leader tactics afford no evidence of the existence of or participation in an illegal combination such as is alleged.

g. This petitioner's open price policy is in accordance with the law as laid down in the *Sugar Institute Case*, 297 U. S. 553.

h. The evidence wholly fails to support any finding of discrimination as between purchasers of cement in this petitioner's territory within the meaning of the Robinson-Patman Amendment to Section 2 of the Clayton Act.

(1) "Price" means destination price as between truly competitive buyers. The intention of Congress in this respect was clearly and unequivocally shown by;

(a) Discussions in Congress relative to destination prices and the anti-basing point provision;

(b) Discussions relative to competitive buyers;

(c) Discussions relative to freight absorptions.

Dated: March 14, 1944.

Respectfully submitted,

Louis W. Myers,

Pierce Works,

Attorneys for Petitioner Riverside Cement Company.

O'Melveny & Myers,

Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8399) * *

STATEMENT OF POINTS.

(Filed March 20, 1944. Kenneth J. Carrick, Clerk.)

Universal Atlas Cement Company (hereinafter sometimes referred to as "Universal"), the petitioner herein, by its attorneys, files the following Statement of Points setting out separately and particularly the errors asserted and intended to be urged by petitioner with respect to the Findings as to the Facts and Conclusion and Order to Cease and Desist issued by the Federal Trade Commission (hereinafter sometimes referred to as the "Commission") under date of the 17th day of July, A. D. 1943, *In the Matter of The Cement Institute, et al.*, Commission Docket No. 3167:

Foreword.

The "Findings as to the Facts and Conclusion" issued by the Federal Trade Commission in this case relate to evidence produced by 75 different cement manufacturing companies, The Cement Institute and certain of its officers and various witnesses called by the Commission. The Findings are a fragmentary statement purporting to cover almost all of the activities in which cement manufacturing companies engage in manufacturing and selling cement. The Findings are written in a way to create the inference that all of the Findings apply to all of the cement manufacturing companies. This is an error for many of the activities referred to in the Findings were not participated in by Universal and many other companies.

Despite the fact that 16 employees of Universal were called as witnesses either by the Commission or by Universal (being a much larger number of witnesses than was called from any other company), the Commission makes only fragmentary findings of the evidence produced by these witnesses. The evidence produced by Universal witnesses was full and complete regarding all of its marketing activities and methods, and evidence was detailed

with respect to actual bids and other transactions to show that there had been no contact with competitors and no collusion and agreement of any kind. Nevertheless, the Commission's Findings completely fail to reflect this evidence.

The case of the Commission is based upon alleged collusion and agreement among the cement manufacturers in carrying on their business of selling cement. The Findings should point out particularly just what each company did and wherein each company is alleged to have colluded or agreed illegally. No direct proof of collusion and agreement exists. If the fragmentary findings of the case were enlarged to cover all the material facts, the legality of the activities of the cement companies would be demonstrated. Since this Court must determine whether the Findings made by the Commission are supported by substantial evidence, Universal finds it necessary to restate what the Commission should have found. It will be observed that the error of the Commission lies largely in its failure to find all of the material facts. When all of the facts are stated, the inference of collusion which the Commission draws from its fragmentary Findings will disappear. For example, the Findings refer to numerous cases of identical bidding by competing manufacturers. The Commission obviously infers that these identical bids prove collusion, yet the Commission has failed to make Findings showing how these identical bids occurred.

This Statement of Points will be divided into two parts. Part A will be a statement of the facts which the Commission should have found with respect to Universal Atlas Cement Company. Part B will be a detailed criticism of the fragmentary Findings which were actually made by the Commission. For convenience, the Findings as to the Facts, Conclusion, and Cease and Desist Order of the Commission are attached to this Statement of Points as an Appendix.

Part A.

The Commission Erred in Failing to Make the Following Findings With Respect to Universal Atlas Cement Company.

Underlying facts important in this case.

1. Cement is a standard commodity made in standardized specifications, not differing substantially among producers in quality except as between recognized and standardized grades thereof. The cement industry is a heavy-goods industry. Carriage charges for cement often constitute a substantial part of the cost to the customer. (Complaint, Count I, Paragraph Three, and answer of Universal thereto)

2. The evidence shows overwhelmingly that buyers of standard cement will not pay more for one brand than for another brand. (R. 1737, 26196, 29036, 34421, 34859-60, 34832, 36479, 36753, 36758, 36794-95, 37121, 38744; Complaint, Count II, Paragraph Eight)

3. Buyers will buy only from that seller offering the most favorable price and other terms and conditions at points of delivery. (R. 30590, 30778, 31281-82, 32094-95, 35633, 37287-88)

4. Buyers of cement desire the quoting of destination prices so that they can more readily compare total costs of cement at destination as quoted by different companies. (FTC Exh. 181; R. 180, 213, 1718, 1771, 1802, 1809, 2452, 2569-70, 4930, 5460, 10455, 13034, 24194, 27062, 34861-63, 38747)

5. Sellers of cement desire destination prices because no seller can sell cement unless his price (total cost to customer) at destination is as low as the total cost to customer from any other seller. (R. 34832 and other citations to 2 *supra*)

The multiple basing point method of pricing.

6. All of Universal's mills are so-called "base point mills". Universal's method of pricing has been and is to establish a price base at each of its mills and to make destination prices to its customers by adding to the price

base at the mill the freight from that mill to customer's destination, and such method of pricing by Universal is fair and non-discriminatory. Universal makes its prices in the way described in all cases unless it finds a lower destination price quoted at some location, in which event Universal customarily reduces its destination price to meet such lower price. The reason Universal at times meets lower prices is that Universal cannot sell its cement unless its price is as low as that quoted by any other cement seller. This method of pricing is what is commonly known in the cement industry as the "multiple basing point system" or the multiple basing point method of pricing. Universal has no agreement or understanding with its competitors to make prices in the method described and is under no obligation of any kind to do so. (R. 4038, 13035, 34795-800, 34832, 34909)

How Universal Atlas Cement Company makes its prices.

7. Universal Atlas Cement Company's usual method of making its prices is to take its price base at its mill and add to that figure the freight from that mill to the destination of the cement. But when it finds that a price made in that manner is higher than some competitor is charging for cement at the particular destination, Universal Atlas Cement Company, if it wishes to sell at that destination, lowers its price to meet the figure at which cement is being sold there by its competitor. (R. 34832, 4038)

8. The reason Universal Atlas Cement Company meets the competition of lower prices named by competitors, as above described, is that cement buyers will not pay a higher price for the cement of Universal Atlas Cement Company than they will pay for the cement of any competitor of Universal Atlas Cement Company of the same kind and quality at the same time and place. (R. 34832)

9. An exception to the method of making prices above stated occurs in some cities, where it would be impractical and discriminatory to have varying delivered prices in the same city. Therefore, in some large cities, Universal's prices are the same to all customers regardless of actual freight rate involved. (R. 34833) The reason why all customers in such zones are given the same destination

price is that those customers are usually competing with each other. (R. 34834) Customers have recognized the fairness of this method of pricing in zones and it has worked very satisfactorily. (R. 34835)

10. Another exception made from time to time to the method of making prices which Universal Atlas Cement Company generally employs is that involved where foreign cement comes into this country at lower delivered prices. In such instances, Universal Atlas Cement Company, if it wishes to sell its cement, makes lower prices than those arrived at by its usual method above described to meet foreign competition, the reason being that customers will not pay higher prices. (R. 34837) This action of making lower prices is voluntary on the part of Universal Atlas Cement Company (R. 34841)

11. During 1931 and 1932 there was a period of general demoralization in the cement industry, which was country-wide, that is, east of the Rocky Mountains where Universal Atlas Cement Company did business (R. 34927), during which time prices were very low and often made without reference to any price base. (R. 34843)

12. This demoralization began with a rapid shrinkage of demand, beginning about 1929-30 following three or four decades of generally expanding business. (R. 34844) With the shrinkage in demand some manufacturers made price cuts on large orders to maintain volume. These price cuts became widespread but though prices at destination became lower and lower, they remained generally uniform. (R. 34847)

13. The so-called basing point method of delivered prices was not responsible for this demoralized condition. (R. 34845) When prices went very low during this demoralization, the tendency toward uniform prices remained just the same as when prices were higher. (R. 34846) This uniformity of price at low levels, as well as at high levels, is because of the fact that nobody will pay more for one brand of cement than for another. In other words, the customer makes delivered prices uniform, instead of the method of selling making them uniform. (R. 34847)

14. For many years there have been differentials between the price of cement in cloth bags, in paper bags and in bulk. This differential has been twenty-five cents per

barrel less for cement in paper bags than the price in cloth bags and the price in bulk is forty-five cents per barrel less than the price per barrel in cloth bags. (R. 3936-37)

Why Universal Atlas Cement Company sells its cement at destination prices.

15. The principal reason cement is sold at destination prices is because that is the way customers want to buy cement. This practice of selling at destination prices has existed for many years, almost from the beginning of the cement industry in this country. (R. 34861, 13034) Sellers also generally desire destination prices. See Paragraph 5 *supra*.

16. With the exception of isolated cases, there has been no demand from cement customers for a different method of selling. (R. 34862) The customer wants to know what cement will cost him at his destination and the customer does not want to be bothered with computing freight rates. (R. 34863)

17. The general use of delivered prices in the cement industry came as a matter of logical growth. It came into use because it was a simple and logical method of marketing cement. (R. 34833)

Why cement prices at destination are generally uniform.

18. Cement prices at destination are generally uniform because customers will not pay more for one brand than for another. Their refusal to pay more for one brand than for another is because cement is a standard product. (R. 34859, 3885) Moreover, the dealers who buy the great bulk of cement do not buy it for their own use but for sale and they are in competition among themselves. (R. 34860, 7917)

19. Cement customers, such as dealers, recognize this inevitability of uniformity of cement prices at any given place of delivery and are satisfied. (R. 34922)

20. Dealers recognize that it is practically impossible for any one dealer at a given place to buy at a lower price than other dealers at the same place. (R. 34922)

21. Dealers are satisfied if they can be reasonably sure that they are not paying more for their cement than some other dealer at their location is paying. (R. 34922)

22. Uniformity of price is a thing not invented and forced upon the public by cement makers. It is a thing that is brought about completely by well-informed cement buyers. They will not pay more for any one cement than for any other cement, and that tends to bring it down to a uniform price. (R. 34947)

23. Long experience shows that the lowest price quoted by any competitor under normal conditions quickly becomes the uniform current market price quoted by all competitors at the same point of delivery. (R. 34947)

24. While there are some differences in standard cement of various companies, such as differences in color and slight differences in strength, the principal thing the customer is interested in is that the cement conform to minimum specifications, and the buyer will not pay more for one brand than for another if both meet minimum specifications. (R. 34948)

How Universal Atlas Cement Company learns its competitors' destination prices.

25. Universal Atlas Cement Company, through some 200 salesmen traveling daily throughout the country where it markets cement, learns from its customers what prices are being quoted by competing cement companies. (R. 34855, 35089)

26. Cement prices in principal cities are, in most cases, published in trade publications. (R. 34857)

27. For many years changes in cement prices have been broadcast by many manufacturers. Dealers know that there is nothing confidential about cement prices. (R. 34857)

28. A number of exhibits in the record are price quotations made by competitors of Universal in writing to dealers at various destinations, which had been picked up by Universal Atlas Cement Company salesmen from dealers to whom such quotations had been made and as the result of which Universal Atlas Cement Company acquired knowledge of the price quotations made by its said competitors. (See for example FTC Exhs. 2268-2358)

29. Knowledge of price changes made by competitors to its customers is gained in the method above described

by Universal Atlas Cement Company almost immediately, usually within 24 hours after the price changes are made. (R. 476, 7917)

How price base changes of competitors are learned by Universal Atlas Cement Company.

30. When Universal Atlas Cement Company salesmen in the field have picked up from their customers quotations which the customers have received from competing cement manufacturers making a change in the destination price at various destinations, Universal Atlas Cement Company is then able to determine from those quotations whether the competing manufacturing company which submitted the quotations is using a price base or has made a change in its price base and, if so, what the new price base is. Universal Atlas Cement Company can do this by deducting from each destination price quoted by the competitor the amount of the freight from the competitor's mill to the destination in question and if a constant figure results from such deductions, the result indicates that the competing mill has established a price base in the amount of the constant figure. This has been made clear by many witnesses throughout the testimony. (See for example, testimony of F. L. Stone, Vice President of Universal, R. 487, 35119-23, 35280-83)

31. It is not necessary to obtain such price base figures from other manufacturers and the Universal Atlas Cement Company has not obtained such figures from competitors, nor has it distributed lists of price bases to other manufacturers or to customers. Such a list made up by Universal Atlas Cement Company has been given by Universal Atlas Cement Company to its salesmen. (R. 17149-50)

How Universal meets price changes that have been made by competitors.

32. Resp. Exh. 2487 is a tabulation showing price bases in effect at each of the Universal Atlas Cement Company plants on January 1, 1920, and all changes thereafter and the effective date of the change, to September 6, 1938. (R. 35105-6)

[Note: The tabulation includes price bases of the mills owned by Atlas Portland Cement Company prior to the

time these mills were purchased by Universal Atlas Cement Company. Prior to January, 1930, the only mills owned by Universal Atlas Cement Company were those at Universal, Buffington and Duluth.]

33. Price changes by Universal Atlas Cement Company are communicated to various sales managers and other interested employees of the company by means of price memoranda. Numerous examples of such price memoranda appear in the record as Resp. Exhs. 2488 to 2509 B, inclusive. The usual substance of such price memoranda is an announcement that the company has found that some competitor company has made a change in price from a certain mill, and then the price memoranda contain instructions to Universal Atlas Cement Company employees to meet such change in price. (R. 35108-09)

34. All of the price changes shown in Resp. Exhs. 2488 to 2509B, inclusive, are shown also on the tabulation (Resp. Exh. 2487). However, the tabulation (Resp. Exh. 2487) shows the price base figures after deduction of all discounts, whereas the price memoranda (Resp. Exhs. 2488 to 2509 B, inclusive) show the price base figure at Universal Atlas Cement Company mills before deduction of any discounts. (R. 35109-11)

35. These price memoranda announcing changes in price are made as the result of information learned by the company consisting of quotations picked up in the field showing price changes by competitors, communications from Universal Atlas Cement Company salesmen in the field stating that they have learned of price changes by competitors, and similar material. (R. 35122-23)

Universal Atlas Cement Company does not contact its competitors regarding price changes.

36. Knowledge of price changes by competitors is learned by Universal Atlas Cement Company through its salesmen in the field picking up quotations which have been made by competitors to cement dealers. Universal Atlas Cement Company has not followed the practice of confirming such information by contacting the competitors who put out quotations of price changes, nor has the company found its competitors following any practice of contacting Universal Atlas Cement Company regarding price changes quoted by it. (R. 35290)

Universal's contacts with competitors have been carefully supervised to avoid violations of law.

37. In contacts with competitors, the representatives of Universal Atlas Cement Company refrained from any discussion of subjects which counsel had advised were improper to discuss and subjects which they had learned from previous litigation were improper subjects for discussion. The previous litigation referred to included the Cement Manufacturers' Protective Association case (268 U. S. 588). For example, no discussion was had as to what future prices and terms of sale for cement would be. (R. 34801)

38. In June, 1932, the president of Universal Atlas Cement Company received two memoranda, each dated June 7, 1932, signed by Nathan L. Miller, General Counsel of United States Steel Corporation, regarding relations with competitors and regarding sales methods, respectively. (Resp. Exhs. 2463 A-C, 2464 A-E, 2465) The memorandum regarding relations with competitors (Resp. Exh. 2463 A-C) reads as follows:

United States Steel Corporation
General Counsel's Office.

Memorandum

June 7, 1932

Re Relations with competitors

No understanding, arrangement or agreement, "gentlemen's" or otherwise, in respect of prices, production, division of territory or tonnage can lawfully be entered into between competitors. It is immaterial whether the obligations or restraints imposed are legal or only moral. In either case they are forbidden by law.

However, it is permissible for competitors freely to exchange information on past sales, prices, capacities, costs and the like, to discuss the conditions and needs of the industry, to provide appropriate means for standardization of product and of cost accounting systems, to establish standards of business ethics and even, I think, to agree not to engage in unfair methods of competition.

The gathering and dissemination of statistics, the stand-

ardization of products and of cost accounting systems, the establishment of proper standards of business ethics and conduct and the definition of unfair and unlawful methods of competition are legitimate subjects for the activities of trade associations or of direct discussion between competitors without the intervention of trade associations. But neither trade associations nor discussions between competitors may be employed either to cloak or as a means to effect or enforce, directly or indirectly unlawful agreements to fix prices or to divide territory or business, or the like.

In other words, each individual competitor must be free to act as he pleases without any contractual or moral restraint or coercion whatever. Each has a perfect right to be guided by self-interest, to refrain from acts provocative of retaliation and to do what he can free from any moral or legal restraints to prevent demoralization and to stabilize the industry. To that end the fullest discussion and the fullest exchange of information are permissible. The harmful effects of cut-throat competition, of unfair trade methods, of selling below cost or even a fair margin of profit, and the like, are legitimate subjects of discussion, but the line must be drawn at anything, no matter what, involving coercion or restraint, whether contractual or only moral, which interferes with the free and independent action of each. In other words, reliance must be placed upon enlightened self-interest, not upon any form of concerted action or understanding, express or implied.

To illustrate:- It is permissible to inform competitors of one's prices in the past. It is not permissible to state what the future prices are going to be, because that necessarily involves the obligation, either moral or otherwise, to charge the prices named. It is permissible to call attention to the demoralization resulting from price-cutting. It is not permissible by any sort of concerted action to use coercive measures, promises or threats to influence a competitor not to cut prices. The periodic exchange of information on capacity, sales, prices and the like will naturally tend to stabilization, but that is permissible since it is the result solely of enlightened self-interest. It ceases to be permissible only when there is introduced some element of agreement, "gentlemen's" or otherwise, or of concert of action designed to coerce or restrain free and independent action.

There is less uncertainty as to the meaning of our anti-trust laws than seems to be popularly supposed. The terms "unreasonable restraint of trade" and "public interest" are supposed to introduce elements of uncertainty, but they have no application to direct restraints such as price-fixing agreements and the like. They apply only to those indirect restrains which are incidental to an arrangement in and of itself lawful, e. g., an agreement for a limited time and within limited area not to reengage in a particular business incident to a contract for the sale of such business, or to those incidental restraints resulting from mergers or consolidations of two or more companies. The merger or consolidation being in itself lawful, the question arises under the anti-trust laws where competition is involved whether the resulting incidental restraint of trade is unreasonable and therefore against the public interest. In the case of agreements directly to restrain trade, such as price-fixing agreements, the law deems them unreasonable and contrary to the public interest.

Nathan L. Miller—General Counsel.

39. The memorandum entitled "Sales Methods" (Resp. Exh. 2464 A-E) discussed various subjects such as discounts, drawbacks or rebates, control of resale prices, agreements limiting buyers from dealing with others, requirement contracts, agencies, dealers and distributors, and consignment contracts and was an opinion by counsel as to what were proper and legal steps that could be taken in connection with each subject mentioned.

40. Copies of these memoranda were sent, under date of June 24, 1932, April 17, 1933, June 14, 1935 and March 13, 1936, to all sales managers of Universal Atlas Cement Company at branch offices (R. 34804; Resp. Exh. 2466 A-F) as instructions. For example, see Resp. Exh. 2466 A, being a letter from F. L. Stone, Vice President, to sales managers of the company, the third paragraph of which says in part:

"We again caution you about discussions with competitors. It is permissible, of course, for our people to meet with competitors but discussion at those times should be limited to such matters as exchange of information on past sales, past prices, capacities, etc. Nothing involving future prices, terms and other elements of such future prices should be mentioned."

41. Even as to those matters which the General Counsel's memorandum (Resp. Exh. 2463 A-C) said were proper for discussion, there has been very little of such discussion between Universal Atlas Cement Company representatives and its competitors. (R. 34823, 34984) Such conversations as there have been were usually regarding increasing the use of cement and standardization, such as would occur in discussions at Portland Cement Association and American Society for Testing Materials meetings. (R. 34823)

42. Capacities of mills were not discussed because well-known, and costs were not discussed because costs were generally considered trade secrets. (R. 34824) Business ethics were sometimes discussed with competitors but there was no obligation, as a result of these discussions, on any company or on any competitor to do or not to do anything whatsoever. (R. 34826)

43. Prior to NRA, Universal Atlas Cement Company was not a member of The Cement Institute and, therefore, participated in no discussions or meetings of the Institute. During and after NRA, Universal Atlas Cement Company was a member of The Cement Institute and had representatives at meetings of The Cement Institute. However, there was no discussion of future prices at these meetings after NRA and practically no discussion of past prices. (R. 34827-28)

44. The Cement Institute has not been used by Universal Atlas Cement Company or its representatives for any discussion of cost accounting. (R. 34828)

Universal Atlas Cement Company's actions have been without agreement with its competitors.

45. B. F. Affleck, President of Universal Atlas Cement Company until September, 1936, testified that in all of the various activities of the company during the time as president, the action of Universal Atlas Cement Company had been taken of its own volition without any agreements with and without any obligations to its competitors. (R. 34909)

46. All actions of the company have been determined entirely by its own officials. (R. 34909)

Freight rate books.

47. Universal Atlas Cement Company has used Cement Institute freight rate books since late in 1936. Salesmen in the field for the company are supplied with these books. (R. 35124)

48. It would be more expensive for the company to prepare its own freight rate books, as it formerly did, than to use the Cement Institute books. (R. 35125)

49. Prior to the use of the Cement Institute freight rate books Universal Atlas Cement Company prepared its own freight rate books showing the freight rate in cents per barrel. This involved considerable work and expense which was not necessary after the Company began to use the Cement Institute freight rate books. (R. 4034-35)

50. The Cement Institute freight rate books contain information in a condensed form taken from various railroad tariffs, all of which information is available to the respondents in voluminous railroad tariffs. (R. 4008-09, 4090-91, 4113-14, 16843-46, 16854-55, 16863-64, 38565-66, 40757)

51. The freight rate books do show the actual lowest freight rate available by any route from mills to various destinations.

52. It has been the custom of the Universal Atlas Cement Company and, in fact, of the entire cement industry in determining freight rates per barrel to drop fractions of less than one-half cent to the next lower cent and to change fractions of, or in excess of one-half cent to the next higher unit, so that cement is always quoted in even cents per barrel. (R. 4042) There are exceptions to this in the case of Government orders. (R. 4043)

53. It has been the practice of Universal Atlas Cement Company to invoice its customers at destination prices and show on the invoice the amount of freight. The customer paid that freight to the railroad for the account of the shipper. (R. 4043-44) This was true except where shipments were prepaid. (R. 4044)

Land grant freight rates.

54. Where land grant freight rates in connection with sales to the United States Government are involved, these freight rates per barrel often extend to a number of decimal points and Government destination cost quotations frequently result in long fractions running into a number of decimal points. Fractions are not usually dropped or added in connection with such quotations, as is done in commercial sales, and the reason is so that the Government may have the full benefit of land grant rates. (R. 4060-62) In such cases if fractions of one-half cent and more were increased to the next higher cent, the Government would not get the full benefit of the land grant rate, although if the fractions below one-half cent were dropped, the Government would get more than the full benefit of the land grant rate. (R. 4063-64)

55. There has been no discussion among cement manufacturers about the handling of fractional land grant rates. (R. 4064)

56. Since the discontinuance of filing land grant freight rate information with The Cement Institute, Universal Atlas Cement Company has not circulated among its competitors any land grant rate information nor has it received any such information from competitors. It gets most of such information from the railroads but sometimes computes such information through its own Traffic Department. (R. 4532-33)

57. Distribution of information on land grant rates was discontinued by The Cement Institute in January, 1937. (R. 16933)

How Universal Atlas Cement Company quotes the government in connection with land grant freight rates.

58. A destination cost bid is the naming of a figure in a bid from which the Government's lowest available freight rate is authorized to be deducted in order to arrive at an f.o.b. mill price. After this f.o.b. mill price is determined by deducting the lowest available freight rate from the destination cost named in the bid, then that f.o.b. mill price is the price put into the contract of sale.

59. The destination cost named in the bid was arrived

at by comparing price bases at various basing point mills plus land grant freight rates from those mills to the destination in question. The lowest combination was the lowest destination cost which it might be expected would be named in a bid by any bidder. In an endeavor to be as low as any bidder, destination cost bids by other bidders frequently named a destination cost figure identical with this lowest combination of price base plus land grant freight rate. (R. 35529-31; Resp. Exh. 2539)

60. The destination cost type of bid is a type of bid by which the bidder agrees to make a sale at a price f.o.b. mill, the f.o.b. mill price to be determined in the manner stated in the bid.

61. The form of destination cost bid to the United States government from which the government could determine an f.o.b. mill price, is illustrated by the bid made to the office of the Quartermaster, Fort Riley, Kansas, for opening June 17, 1937, and reads as follows (Resp. Exh. 2537-S):

"$2.15 per barrel in paper bags, Destination Cost to the U. S. government for Fort Riley, Kans.

"The U. S. government shall determine its contract price f.o.b. cars Independence, Kans. on shipments moving on U. S. government bills-of-lading to the above-named destination only, by subtracting from the above-mentioned Destination Cost to the U. S. government, land-grant rate as determined by the U. S. government as being applicable from Independence, Kans. to said destination, or the actual commercial freight or special government rate applicable from Independence, Kans. to said destination, whichever rate is the lowest."

62. This bid resulted in a contract between the Universal Atlas Cement Company and the office of the Quartermaster, Fort Riley, Kansas, dated June 30, 1937, calling for shipment f.o.b. Independence, Kansas, moving on government bill of lading of 1500 bbls. of cement at the f.o.b. Independence, Kansas, price of $1.760082 per bbl. (See Resp. Exh. 2536 A-B)

63. Another example of the form of destination cost bid to the United States government appears in the bid of Universal Atlas Cement Company to the office of the Quartermaster, Fort Leavenworth, Kansas, for opening April 17, 1937. (Resp. Exh. 2540 D)

64. Witness Sutherland illustrated how Universal Atlas Cement Company makes a destination cost bid to the United States government, that is, the naming of a destination cost from which the government can determine a figure at which to buy cement f.o.b. Universal Atlas Cement Company mill. The process was for the witness to add the land grant freight from Universal Atlas Cement Company's mill to the destination in question to the price base at the Universal Atlas Cement Company mill. A similar computation was made by the witness with respect to other mills which might compete for the business, and then it was the practice of Universal Atlas Cement Company to shrink its destination cost bid to the government as low as the lowest figure produced in the method described from any mill. (R. 35529)

65. This was further illustrated by a hypothetical exhibit of the witness (Resp. Exh. 2539), which exhibit shows how commercial prices f.o.b. destination, as well as destination cost bids to the government, are arrived at, the process being the same except that in commercial prices f.o.b. destination, commercial freight rates are added to the various price bases of competing mills, whereas in determining destination costs, land grant or other lower freight rates available to the government are added to the various price bases to determine which mill is likely to bid the lowest destination cost to the government. That is done by Universal Atlas Cement Company because it cannot sell cement higher than the lowest figure named by any competitor. (R. 35531)

66. If the government gets a destination cost equal to the shipping mill's price base plus land grant freight rate from that mill, the government gets the full benefit of the land grant freight rate, and if that shipping mill, because of competition, shrinks the destination cost further, the government gets something in addition to the benefit of land grant freight rates. (R. 35533)

67. While the land grant freight rates which Universal Atlas Cement Company has learned from various railroads are sometimes slightly at variance with the land grant freight rates actually paid by the government for shipments, these variance s over a year and a half of shipments made by Universal Atlas Cement Company from the territory in which Witness Sutherland was located, amounted to something less than $50.00, one way or the other. (R. 35537-38)

Universal was permitted by the Trial Examiner to introduce evidence regarding several of its bids to government agencies in instances where other companies had submitted identical bids. Such evidence proves without contradiction that Universal determined and made its bids without collusion or agreement.

Example 1. War Department—Office of the Quartermaster, Fort Riley, Kansas, bids opened May 22, 1937.

68. FTC Exh. 366 B is abstract of bids which indicates that no award was made on that bidding. Resp. Exh. 2535 A is the invitation for such bids received by Universal Atlas Cement Company, and Resp. Exh. 2535 B is a letter from Universal Atlas Cement Company submitting its bid. (R. 35506-07)

69. Universal Atlas Cement Company bid $2.34 per bbl. in paper bags f.o.b. cars Fort Riley, and as an alternative bid named a destination cost of $2.15 per bbl. at Fort Riley if the government should buy the cement f.o.b. Universal Atlas Cement Company's mill and make shipment on government bills of lading. The destination price bid of $2.34 was arrived at by taking the price base at Bonner Springs of $1.70, adding to it freight of 49 cents and 15 cents for package charge, making a total of $2.34. The destination cost bid was arrived at by taking the price base at Iola of $1.70, plus 30 cents land grant freight rate and 15 cents for paper packages, making a total of $2.15. (R. 35508)

70. Both the destination price bid and the destination cost bid above referred to were derived from a previous bid which Universal Atlas Cement Company had made for bids to be opened April 12, 1937 at the same location. Freight rates and price bases had not changed in the meantime. (R. 35509)

71. Under the destination cost bid above referred to, the government was permitted to make the purchase f.o.b. cars at the Universal Atlas Cement Company mill. (R. 35512)

72. The price which the government would pay f.o.b. mill under the destination cost bid was to be determined under the terms of the so called control clause attached to the bid. The method was to subtract from the destination cost named in the bid the lowest freight rate to which

the government was entitled from the Universal Atlas Cement Company mill at Independence, Kansas, to Fort Riley, Kansas, and the remainder would be the figure at which the government would be entitled to make the purchase f.o.b. cars at the Independence mill of Universal Atlas Cement Company. (R. 35512)

73. While the government did not make any purchase under the bids opened May 22, 1937, referred to in FTC Exh. 366 B, nevertheless where destination cost bids to the U. S. government made by Universal Atlas Cement Company have been accepted, the practice has been to draw up a contract between Universal Atlas Cement Company and the government providing for a sale f.o.b. cars Universal Atlas Cement Company plant, at a price f.o.b. mill derived in the manner stated in the control clause. An example of such a contract resulting from a destination cost bid is shown in Resp. Exh. 2536 A-B, being a contract dated June 30, 1937, between Universal Atlas Cement Company and the office of the Quartermaster, Fort Riley, Kansas, calling for 1500 bbls. of cement f.o.b. Independence, Kansas, to move on government bills of lading at an f.o.b. mill price of $1.760082 per bbl. (R. 35513-14)

74. The destination cost bid which resulted in the contract (Resp. Exh. 2536 A-B) was the same type of destination cost bid as was submitted to the Quartermaster at Fort Riley and which is referred to in FTC Exh. 366 B and as is further shown by the bid itself. (Resp. Exh. 2537 A-Z10) See particularly Resp. Exh. 2537 R, which shows a destination price bid of $2.34 per bbl. for delivery f.o.b. cars at Fort Riley, Kansas, and see alternative destination cost bid of $2.15 per bbl., together with control clause shown on Resp. Exh. 2537 S. That destination cost bid of $2.15 per bbl. produced the contract price of $1.760082 per bbl. shown on Resp. Exh. 2536 A-B.

75. In connection with the bid opened May 22, 1937, referred to in FTC Exh. 366 B, and as to which no award was made by the government, the destination cost of $2.15 was bid because that was the figure which Universal Atlas Cement Company had to meet to be as low as other bidders. (R. 35519)

76. In determining what competition Universal Atlas Cement Company would have to meet, the representatives of Universal Atlas Cement Company computed the sums

of price bases at various basing mills, plus the freight rates from those mills to Fort Riley, Kansas. (R. 35519)

77. These computations were shown in the handwriting of the witness on Resp. Exh. 2538 R. (R. 35518-19, 35521)

78. While the land grant freight rate to Fort Riley, Kansas, in the bids above referred to was a fraction more than 30 cents from the Iola mill, Universal Atlas Cement Company dropped the additional fraction because in an earlier bid in 1937 a competitor had dropped the fraction in making similar bids, thus making a lower destination cost to the government than if the fraction were added to the land grant rate. (R. 35539)

79. Whenever a destination cost bid to the government was accepted and an award made to Universal Atlas Cement Company, a contract was made selling the cement to the government f.o.b. mill. (R. 35524)

80. In the preparation of the bids above mentioned, Universal Atlas Cement Company representatives had no contact with competitors, did not ask competitors what they were proposing to bid, nor did any competitor ask Universal Atlas Cement Company what it was proposing to bid. (R. 35524)

81. It is clear that if the government's freight rate, land grant or otherwise, should be lowered after a destination cost bid had been accepted by the government, the government would get the full benefit of such lowered freight rate. (See discussion of counsel and concession to that effect, R. 35527-28)

82. The land grant freight rates from various mills which Universal Atlas Cement Company used in making the computations to determine what its bid should be were obtained by Universal Atlas Cement Company representatives inquiring from the railroads (R. 35528) and at times from information supplied by the government on abstracts of earlier bids. (R. 35529)

Example 2. Bureau of Reclamation—bid of February 10, 1936 for Hamilton Dam.

83. FTC Exh. 2267 A-C refers to the bid made by Universal Atlas Cement Company for opening February 10, 1936, to the Bureau of Reclamation for Hamilton Dam—Colorado River Project. (R. 13107, 13110)

84. FTC Exh. 2267 A-C was made by employee J. D. Scovel of Universal Atlas Cement Company and was made up in connection with the preparation of the bid. (R. 13107)

85. FTC Exh. 2267 A shows certain computations designated "old method" and FTC Exh. 2267 B shows certain computations designated "new method." FTC Exh. 2267 C shows the difference between the computations on 2267 A and 2267 B, respectively. The computations shown on 2267 A were made in the method that bids had theretofore been made for government projects in Texas (R. 13111), while the computations shown on 2267 B were computations under a considered method which was not, in fact, used when the bid was finally made. (R. 13112)

86. The method used as shown on FTC Exh. 2267 A had been in use for five years or more. (R. 13112)

87. Witness Scovel, who prepared the bid for Universal Atlas Cement Company, did not know what methods were followed by competitors who also bid on the project, but he remembered that the prices of all bidders were identical. (R. 13113-14)

88. Universal Atlas Cement Company did not receive any part of the order, all of which was awarded to the Republic Company. (R. 13115)

89. FTC Exh. 2267 A-C was made on February 4, 1936, prior to the bid. (R. 13143) The purpose of making the computations was to show the difference between what the bids would be if figured in the way which had theretofore been used in sales to the government in Texas as distinguished from what the figures would be if the Texas state cement tax were eliminated entirely from the computations. (R. 13143-44)

90. The computations were made to determine what figures should be bid in the Universal Atlas Cement Company bid which was made by witness J. D. Scovel. (R. 13144)

91. The invitation for bids called for bids f.o.b. destination and f.o.b. point of shipment at the bidder's option. (R. 13144)

92. FTC Exh. 2267 A shows the destination price f.o.b. cars at Beverly, Texas, per bbl. in cloth and per bbl. in bulk, and the lower half of the exhibit shows the destination

cost at Beverly, Texas, from which the government could compute an f.o.b. mill price at the Universal Atlas Cement Company mill. (R. 13144-46)

93. The destination price f.o.b. cars at Beverly, Texas, in cloth sacks, was made by adding together the price base at Universal Atlas Cement Company mill of $1.75, plus the five cents per bbl. state tax, plus the commercial freight rate per bbl. from the mill to Beverly, Texas, of 65c and plus 40c charge per bbl. for cloth sacks, making a total of $2.85, from which was deducted the actual amount paid per bbl. to the State of Texas for tax—4.7 cents, leaving a total of $2.803 as a destination price per bbl. in cloth sacks. (See FTC Exh. 2267 A)

94. The freight of 65c per bbl. was determined from a freight rate book prepared by Universal Atlas Cement Company as this bid was made prior to use by Universal Atlas Cement Company of Cement Institute freight rate books. (R. 13147)

95. The freight rate of 65c per bbl. for shipment in cloth sacks was a computation based on the weight of a bbl. of cement in cloth sacks (380 lbs.) at the rate of 17c freight per cwt., resulting in an actual freight rate of 64.6c per bbl. This was then considered to be 65c according to a custom that has existed in the cement business at least as long as the witness had been in business. (R. 13149-50)

96. It had been the custom of the company to add 5c for Texas state tax but because the tax did not apply to sales to the United State government, the actual tax of 4.7 cents per bbl. was deducted. The witness followed a custom in this respect which had existed for many years. (R. 13151)

97. In determining the destination price f.o.b. cars at Beverly, Texas, for bulk cement, the witness deducted 45¢ from the per bbl. price of cloth cement, which was a practice the company had followed since 1932 in numerous instances. (R. 13152-53)

98. This deduction represented 40¢ for cloth sacks and 5¢ additional for the lesser cost of handling bulk cement, resulting in a destination price f.o.b. cars at Beverly, Texas, of $2.353 per bbl. for bulk cement. (R. 13153)

99. In computing destination cost from which the government might determine an f.o.b. mill price, the computation for cloth sacks was made in the same way as the destination price above described except that the actual

freight rate of 64.6 cents per bbl. was used, making the destination cost in cloth $2.799 per bbl. This was done because since some time early in 1934, when the use of destination cost bids with the so called control clause arose, it had been the practice to use actual freights without dropping or adding fractions thereto in the case of bids to the United States government. (R. 13154)

100. This was known by the witness because bids made in that manner had been filed with the Code Authority during NRA, with which the witness was familiar. (R. 13155) This had become a common practice. (R. 13156)

101. The method of computing the destination cost for bulk cement from which the government could determine an f.o.b. mill price was to take the price base at the Universal Atlas Cement Company mill for shipment in bulk of $1.70, to which was added 5¢ for state tax and to which was further added 63.92 cents, which is the actual freight rate per bbl. of bulk cement (376 lbs.) from the Universal Atlas Cement Company mill to Beverly, Texas, and from the sum of those figures deduct 4.7 cents, leaving a total destination cost per bbl. of bulk cement of $2.3422. The actual freight, rather than adjusted freight, arrived at by adding or dropping fractions, was used because it had become a custom to use actual freight rates in making destination cost bids to the government. (R. 13158-59)

102. The destination prices f.o.b. cars at Beverly, Texas, and the destination cost shown on FTC Exh. 2267 A were the figures used in making the bid by Universal Atlas Cement Company. (R. 13159)

103. The computations on FTC Exh. 2267 B were made by the witness on or about February 4, 1936, without giving any consideration to the Texas state tax at all; otherwise made in the same manner as in FTC Exh. 2267 A. (R. 13159-60)

104. FTC Exh. 2267 B was made because there had been some discussion in Universay Atlas Cement Company as to whether the Texas state tax should be left out of the computations entirely on quotations to the United States government. No bids had ever been made in Texas to the United States government up to that time where the state tax had not been considered. (R. 13161)

105. After witness J. D. Scovel made up FTC Exh. 2267 A-C, discussion was had in Universal Atlas Cement Com-

pany as to how the bids should be made and it was determined to bid in the same manner which had been followed for a number of years, that being the method shown on FTC Exh. 2267 A. (R. 13162-63)

106. There was no discussion with competitors of Universal Atlas Cement Company before preparation of the bid, during its preparation or after the submission of the bid. No statement was furnished to competitors as to what Universal Atlas Cement Company proposed to bid and no discussion was had with competitors at all regarding the bid. (R. 13165)

107. No allowance or credit was given to Universal Atlas Cement Company by any other bidder for a portion of the business on the Hamilton Dam letting. (R. 13168)

108. The method which was used by the witness in making up the Hamilton Dam bid was the same method which had been used in making bids to the government during the NRA Code and which method the witness continued to use. (R. 13172)

109. The Hamilton Dam project called for 365,000 bbls. of cement, of which 295,000 bbls. were to be in cloth sacks and 70,000 bbls. in bulk. (R. 19145)

110. Universal Atlas Cement Company bid a destination price f.o.b. Beverly, Texas, for cement in cloth sacks of $2.803 per bbl. and as an alternative bid a destination cost for cement in cloth sacks of $2.799. The difference between these figures resulted from using 65¢ per bbl. commercial freight rate in figuring the destination price and in using 64.6 cents per bbl. commercial freight rate in figuring the destination cost. (R. 19146) Commercial freight rates were used because there was no land grant rate available to the government. (R. 19153)

111. Under the destination cost bid, the government would pe permitted to ship the cement from Universal Atlas Cement Company's mill on a government bill of lading. (R. 19146)

112. Universal Atlas Cement Company also bid a destination price for bulk cement at a price of $2.353 per bbl. and a destination cost in bulk per bbl. of $2.3422.

113. The difference between the total destination price for the quantity of cement ordered both in cloth sacks and in bulk, and the total destination cost on the alternative

bid for the same quantity of cement in cloth and in bulk amounted to $1936. (R. 19147-48). (See computation on FTC Exh. 2267 C) In other words, if the government purchased the cement on the destination cost bid and shipped the cement on government bills of lading, the government would have a total cost for the cement at destination of Beverly, Texas, of $1936 less than if it purchased the cement at the delivered price f.o.b. Beverly, Texas. (R. 19148)

114. There was nothing in the bid of Universal Atlas Cement Company that referred to this saving of $1936 as a special concession, but it was merely a computation of the difference between the alternative bids. (R. 19148)

115. This is true notwithstanding the testimony of Mr. Taylor of the Reclamation Service. (R. 19155-56)

116. Mr. Taylor interpreted this difference of $1936 between the alternative types of bids (that is, the bid of a destination price f.o.b. Beverly, Texas, and the bid of a destination cost under which the government should buy f.o.b. mill and ship on government bills of lading) as being an offer to the government of some sort in connection with the making out of the shipping papers, but the savings of $1936 was, in fact, merely the difference between the two alternative bids. (R. 19155-56)

Example 3. War Department, Office of the Quartermaster, Fort Leavenworth, Kansas—bids opened April 17, 1937.

117. FTC Exh. 368 B is an abstract of bids introduced by the Commission, showing identical bids submitted by six manufacturers of cement, each bidding a delivered price f.o.b. Fort Leavenworth, Kansas, of $2.15 per bbl. and each submitting an alternate bid of $2.14 per bbl. While the abstract does not indicate that this alternate bid was a destination cost bid from which the government could determine the price f.o.b. mill at the various bidders' mills, the bid submitted by Universal Atlas Cement Company shows that the alternate bid was such a destiation cost bid. (See Resp. Exh. 2540 A, D)

118. The $2.15 per bbl. destination price was determined by Universal Atlas Cement Company in the following manner: The price base of the Lone Star mill at Bonner Springs—$1.70—plus commercial freight rate from that

mill to Fort Leavenworth—30 cents per bbl.—plus package charge of 15 cents, was the lowest of similar computations from all possible mills that might be interested in the bidding. The destination cost of $2.14 per bbl., being the alternate bid, was arrived at by taking the price base at the Humboldt, Kansas, mill of the Monarch Company—$1.70—plus the land grant rate from that mill to Fort Leavenworth—29 cents—plus package charge of 15 cents. (R. 35541)

119. No discussion with competitors was had before, during or after the making of such bid (R. 35544) nor was any discussion had with competitors as to any other bids made by Universal Atlas Cement Company to the government. (R. 35545)

The Trial Examiner erroneously refused to permit Universal testimony regarding many of the bids in the evidence.

120. Counsel for Universal Atlas Cement Company appeared before the Trial Examiner with witnesses and offered to produce testimony explaining in detail just what steps had been taken by Universal Atlas Cement Company in connection with each bid made by it and as to which testimony had been introduced by the attorneys for the Commission, but such testimony was rejected by the Trial Examiner inasmuch as it appeared that the proof with respect to various bids would be of the same general nature as that received in evidence with respect to the specific examples hereinabove set forth. Rejection of further proof was upon the condition that Universal Atlas Cement Company should be protected to the same extent as if further proof had been received from it with respect to each bid. (See discussion between counsel and Trial Examiner, R. 35555-59)

Establishing involuntary or punitive price bases at competitor's mills.

121. The evidence shows that Universal has never established a price base at any of its competitors' mills. (R. 13035-40, 13095)

Effect of Universal's practices upon its competitors.

122. The pricing methods and other activities of Universal do not injure any competitor or lessen the business of any competitor.

Cross-hauling and freight absorption are evidences of competition.

123. In this case, the term "cross-hauling" is frequently used to mean the movement of cement from a mill into a territory that is nearer freightwise to some other mill. (R. 34873) Universal Atlas Cement Company has engaged in such cross-hauling during the period of its existence and this has occurred generally in the cement industry. (R. 34876). This was done to reach a larger territory and a more diversified list of customers, and the expense of cross-hauling is regarded by the company as an expense of marketing its products just as are other expenses, such as advertising, selling and traveling. (R. 34876, 34955) The company would have sold a substantially less amount of cement if it had not engaged in the kind of cross-hauling described by the witness. (R. 34877) Cross-hauling is competition. (R. 34956) The practice of mills making shipments into and beyond the territory adjacent to other mills and the making of such "freight absorption" as was necessary to accomplish such purpose has been present at all times in the cement industry, both when prices were relatively high and when they were relatively low, and such practice persisted and was just as evident during periods of extremely low prices which were found during price wars as at any other time. (R. 34873-77, 34883-87)

124. If the company did not cross-haul as above indicated, it would be necessary for each mill of the company to sell its product only in the territory where its price base, plus freight from the mill to destination, would make the price, and the company has a number of mills in which the production of the mills would not be consumed in such territory. As to some mills, that territory would be rather limited. (R. 34877)

125. Cross-hauling enables the company to offset fluctuations in demand in different areas and secure for the mills a more even load factor. (R. 34877-78)

126. An example of what would happen if the company were unable to cross-haul is shown by consideration of the City of Chicago, where building permits fell from $300,000,000 in the middle 1920's to $3,000,000 in the early 1930's. Universal Atlas Cement Company has a large plant just outside of Chicago (Buffington) and it was only by cross-hauling that that plant was enabled to dispose of as much of its product as it did, when consumption in Chicago so seriously declined. (R. 34884)

127. If mills could not cross-haul, they would have to exist on a lesser volume and on a volume which would be subject to violent fluctuations. (R. 34885)

128. It was the opinion of the former president of Universal Atlas Cement Company that cross-hauling in the cement industry does not go beyond reasonable limits. (R. 34885)

129. If cross-hauling of the kind described by the witness were not permitted, such a mill as the Universal Atlas Cement Company's mill at Waco, Texas, would have a monopoly in the territory around its mill where its price base plus freight made the lowest delivered price, but it could not compete with other cement companies beyond that area. (R. 34887)

130. The fact that a mill makes sales in territory where it is required to absorb freight does not necessarily mean that the price in the territory near the mill is higher than it would be if such freight absorbing sales were not made. Selling in freight absorption territory might even enable a mill to lower its average mill net, including a lowering of the mill net in the territory near the mill. Only if the freight absorbing sales were below cost would there be a necessity of raising the average mill net of other sales to offset such losses. (R. 34962-63)

Classification of Universal's customers. Importance of dealers. How announcements of dealer policy are made.

131. Universal Atlas Cement Company has approximately 6000 dealers. The dealers are the most important class of customers the company has. Dealers take more of the company's cement than any other class of buyers. (R. 35075)

132. Resp. Exh. 2473 shows the number of barrels

shipped to dealers and to other classes of customers and the respective percentages for each of the years from 1934 to 1939, inclusive. The exhibit shows the percentage sold to dealers annually varied from 61.89% of total shipments to 73.82% of total shipments. The exhibit also shows that the percentage of shipments direct to the United States Government varied from .86% to 6.83%. The exhibit also shows the percentage of total shipments direct to state governments varied from .53% to 1.01%, and the exhibit further shows that the percentage of total shipments to consumers other than federal and state governments, excepting dealers varied from 23.44% to 36.24%. The number of barrels shipped to each classification of customers in each of the years indicated is shown on the exhibit.

133. Universal Atlas Cement Company had no understanding or agreement with competitors as to how the classification shown on Resp. Exh. 2473 should be determined. (R. 35079)

134. Universal Atlas Cement Company at times makes sales of cement direct to contractors. At other times cement to be used by contractors is sold to dealers. The company at times quotes a price to contractors for the account of a dealer. An example of such quotation is Resp. Exh. 2474. (R. 35080-82)

135. Such quotations for the account of a dealer are made at a figure which the dealer for whose account the quotation is made, has authorized. This is shown on the quotation for the account of the dealer. (Resp. Exh. 2474)

136. Universal Atlas Cement Company has announced its sales policy with respect to sales to dealers and to its other classes of customers by means of printed announcements sent to its dealers from time to time. Resp. Exhs. 2475 to 2483, inclusive, include all such announcements from August 18, 1926, to the time of the witness' testimony, which was March 19, 1940.

137. Another exhibit (Resp. Exh. 2484) shows discount terms of the company from 1909. This exhibit shows that the discount terms of the company have not changed since January 23, 1931.

138. The evidence shows that Universal Atlas Cement Company salesmen pick up from their customers price

quotations or policy announcements made by competing manufacturers. For example, Resp. Exhs. 2485 A-B and 2486 are announcements to the trade made by a competitor of Universal Atlas Cement Company, each of which was picked up by Universal Atlas Cement Company salesmen from customers on the day following their date.

139. The sales policies of Universal Atlas Cement Company above referred to (Resp. Exhs. 2475 to 2483, inclusive) were all put out by the company after it had learned that policies of a simlar nature had been put out by competitors, with the exception of the policy dated January 23, 1931 and the policy dated March 6, 1931 (Resp. Exhs. 2478 and 2479, respectively). These two last mentioned policies were put out by Universal Atlas Cement Company before any competitor had put out any announcement of a similar nature so far as Universal Atlas Cement Company was informed. (R. 35090-94)

140. None of these sales policies put out by Universal Atlas Cement Company (Resp. Exhs. 2475 to 2483, inclusive) was put out as the result of any agreement with any competitor of the company. (R. 35093-93)

141. Universal Atlas Cement Company considers a cement dealer to be a person, firm or corporation who is equipped to handle cement and other building materials for resale and who is able to handle contracts for the sale of the cement. (R. 4209)

142. Universal Atlas Cement Company makes its own decision as to whom to consider a cement dealer. (R. 4210)

How Price Advances and Price Declines Are Communicated to Customers.

143. At the time of price advances Universal Atlas Cement Company sends out thousands of announcements to its customers, announcing the price advances. These announcements bear a date and, in addition, state the date on which the price advances will become effective, the interval usually being five days. (R. 35101)

144. This interval of five days, or at least some interval between the date of the announcement and the time the price advance becomes effective, has been customary for a long time throughout the industry because of the im-

practicability of making a price advance effective immediately. This impracticability is due to dealer commitments to his trade and such factors as fair treatment to all customers. (R. 35102-03) Dealers consider this advance notice benficial to them. (R. 7650)

145. Price declines, on the other hand, are effective immediately. They also are communicated to the trade by written notices. The reason they are effective immediately is because if the date of effectiveness were delayed, customers would not buy in the interim but would wait until the effective date. (R. 35104)

146. Price declines are now usually retroactive as to shipments made within five days prior to the notice of decline. This practice of making them retroactive for five days developed during NRA but even prior thereto, as a matter of practice, price declines were made retroactive to customers who had just prior thereto ordered cement or who had cement in transit, and that practice existed for a long time prior to NRA. (R. 35280)

Trucking and warehouses.

147. Universal Atlas Cement Company has no general policy as to trucking, as shown by the fact that it treats the subject differently at different locations. (R. 35132)

148. The term "trucking" may mean delivery of cement at the mill to the customer in customer's trucks or it may mean delivery of cement by the company in trucks owned or supplied by it. (R. 35132)

149. If trucking were generally indulged in, it was the belief of a vice president of the Universal Atlas Cement Company that the company would be forced to establish large warehouses or distributing stations in large markets that could be reached by trucks from competitive mills but were too far to be reached by trucks from Universal mills. (R. 35134-35)

150. This would involve enormous expense. The company has had just that experience in connection with some locations where cement is supplied by trucks from competitors' mills. (R. 35135)

151. Some of the places where Universal Atlas Cement

Company has been forced to build or rent such facilities because trucking was engaged in from competitive plants are Milwaukee, Green Bay, Muskegon, Oswego, Pittsburgh, Washington, D. C., Miami and Cleveland. (R. 35135)

152. The cost of building its warehouse at Muskegon was about $95,000. Milwaukee and Pittsburgh cost in the neighborhood of $200,000 each. Green Bay cost a substantial amount. At some of the other places the company leases warehouse space. (R. 35136)

153. If trucking of cement were generally engaged in, Universal Atlas Cement Company would be obliged to acquire storage facilities in numerous locations throughout the territory in which it markets its product. (R. 35136-37)

154. Such a result would increase the cost of distribution of cement. (R. 35138)

155. Cement dealers generally do not favor delivery of cement by trucks from cement mills. (R. 35139-40, 8026)

156. Resp. Exh. 2511 is a tabulation showing that trucking costs for transporting cement are sometimes higher and sometimes lower than rail costs for transporting cement to the same destination.

157. There has been no trucking of cement from Universal Atlas Cement Company's Waco, Texas, mill at any time, nor have there been requests by customers from that mill for trucking. (R. 35149-50)

158. There has been no trucking of standard cement from the Hannibal, Missouri, mill of Universal Atlas Cement Company since about 1932. That mill at Hannibal is located about 100 miles from St. Louis and there are competing mills of other companies in and nearer St. Louis than the Hannibal mill. (R. 35150-51)

159. There has been no trucking of standard cement from the Independence, Kansas, mill of Universal Atlas Cement Company since about 1932. (R. 35151)

160. Trucking from the Cleveland warehouse of Universal Atlas Cement Company is either by customers calling in their own trucks or by the company delivering in trucks supplied by it. (R. 35152) The warehouse was established because competitors were already trucking. (R. 35152)

161. Trucking in customers' trucks was engaged in from the Hudson, New York, and Northampton, Pennsylvania, mills of Universal Atlas Cement Company from about 1930 to 1932, however, with a differential of fifteen cents per barrel added to the price base to customers who called in their trucks for cement. Such trucking was discontinued at both the Hudson and Northampton mills in 1932 after discontinuance of trucking had been announced by numerous competitors in that territory, which announcements had been picked up in the field by Universal Atlas Cement Company representatives. (R. 35153-54)

162. At that time there was an unmistakable attitude on the part of cement dealers that they did not like trucking of cement. (R. 35154)

163. Some customers of the Duluth, Minnesota, mill of Universal Atlas Cement Company call in their trucks and take delivery of cement at the mill. (R. 35154) Such trucking was done prior to the filing of the complaint in this case and still continues. (R. 35155)

164. The price to the customer who calls in his trucks for cement at the Duluth mill is the Duluth price base. (R. 35156)

165. This trucking at Duluth is because of a competitive situation resulting from a competitor in Duluth doing such trucking. (R. 35156)

166. Since the Milwaukee, Wisconsin, packing plant of Universal Atlas Cement Company was opened about 1930, the company has delivered cement in company supplied trucks or has allowed the customer to call for cement at the packing plant in his trucks. The sale to the customer is made at a price f.o.b. customer's destination. (R. 35157-58)

167. The building of the packing plant by Universal Atlas Cement Company in Milwaukee was necessary because competitors had previously built packing plants or warehouses there from which they were trucking. (R. 35158)

168. After competitors had built packing plants at Milwaukee and before Universal Atlas Cement Company had built its packing plant, its shipments into the territory had dwindled considerably. (R. 35158)

169. The policy of Universal Atlas Cement Company with respect to trucking from its Milwaukee warehouse is substantially that shown on Resp. Exh. 2515. (R. 35161-62)

170. Milwaukee is a basing point and was made such by a competitor company. Knowledge of this fact was learned by Universal by picking up quotations in the field. (R. 35159)

171. Resp. Exh. 2515 is a statement of trucking policy filed by Universal Atlas Cement Company with the Code Authority during NRA, which policy was determined upon by the company after some competitor had inaugurated trucking from Milwaukee. (R. 35162-63)

172. The reason Universal Atlas Cement Company adopted the trucking policy set out in Resp. Exh. 2515 is that a similar policy had theretofore been adopted by some competitor, which was a more attractive method of selling cement from the buyer's standpoint than that which Universal Atlas Cement Company had therefore followed. The trucking policy was, therefore, adopted for competitive reasons and without any understanding or arrangement with competitors of Universal Atlas Cement Company. (R. 35164-65)

173. The reason the trucking policy was filed with the Code Authority was that a filing with such Code Authority had to be made during NRA before the company could adopt the new policy stated in that filing. (R. 35165)

174. Universal Atlas Cement Company has had a warehouse or other facilities at Green Bay, Wisconsin, since about 1932. These were established to meet the competition of competitive companies having facilities there prior to that time. Trucking is engaged in from the Green Bay warehouse on substantially the same basis as from the Milwaukee packing plant. (R. 35165-66)

175. Green Bay was made a basing point by a competitor in August, 1938. (R. 35166-67)

176. Universal Atlas Cement Company learned this by picking up quotations in the field which had been made by the competitor company and which showed that the destination prices of the competitor were related to a constant figure at Green Bay, thus showing that the com-

petitor had established a price base at Green Bay. (R. 35169)

177. Trucking of cement from the Green Bay warehouse of Universal Atlas Cement Company was inaugurated after competitive companies had begun trucking of cement from that point. However, during the NRA period, Universal Atlas Cement Company was the first company to file with the Code Authority a statement of its policy of trucking from its Green Bay warehouse. (R. 35170-71)

178. Universal Atlas Cement Company has a warehouse in Chicago commonly called its Elston Avenue warehouse. Dealers call at this warehouse in their own trucks and take cement. (R. 35173) Such deliveries are made at a price five cents above f.o.b. railroad car delivery. (R. 35174)

179. In Chicago, Universal Atlas Cement Company has competitors who likewise deliver cement to customers' trucks at the cement companies' warehouses. (R. 35174)

180. Universal Atlas Cement Company also has had a warehouse at Muskegon, Michigan, for some time. Trucking of cement is engaged in from that warehouse on substantially the same basis as from the Green Bay warehouse. Muskegon is a basing point and was made such by a competitive company and not by Universal Atlas Cement Company. (R. 35174-75) Information that a competitor had made Muskegon a basing point was acquired in the same way as in the case at Green Bay,—quotations picked up in the field which had been issued by a competitor. Muskegon became a basing point on November 18, 1935. (R. 35175)

181. Universal Atlas Cement Company also has a warehouse in Washington, D. C. and customers call in their own trucks at that warehouse for cement. (R. 35176)

182. This warehouse at Washington was established because competitive cement manufacturing companies had established warehouses there previously from which trucking of cement was engaged in. The price to the customers is the same as the price delivered f.o.b. rail cars. (R. 35176)

183. At Oswego, New York, a competitive company some years ago sent in a boat of cement and used the boat as a warehouse, and later that company established a ware-

house. Cement was trucked from that boat and later from the warehouse by purchasers. Universal Atlas Cement Company found its sales from that territory diminishing until it too established a warehouse at Oswego. (R. 35177)

184. Universal Atlas Cement Company also has a warehouse at Miami, Florida, which was established after competitors had established warehouses there from which cement was trucked. Universal Atlas Cement Company's action was taken to meet this competitive condition. (R. 35177)

185. Trucking of cement from the Buffington plant of Universal Atlas Cement Company originated in the early 1920's as the result of a serious shortage of railroad cars and as the result of a switchmen's strike which made it difficult to make car deliveries. (R. 35178) The trucking referred to was in customers' own trucks. Trucking by the company in trucks controlled by it came comparatively recently. (R. 35179)

186. The only trucking from Buffington in trucks controlled by the company is into some parts of lower Michigan. Trucking from Buffington is done into parts of Illinois in trucks owned by customers. There is no trucking in Indiana from the Buffington mill because Indiana customers have not wanted it. (R. 35179) The price to dealers who call at the Buffington mill in their own trucks is fifteen cents per barrel above the so-called Buffington price base. This fifteen cent differential or additional charge per barrel for cement delivered to customers' trucks at Buffington has not always been in effect. At times the differential has been charged and at times not charged. The determination as to whether or not it should be charged has been made solely by Universal Atlas Cement Company without consultation with its competitors. (R. 35180)

187. The company considered the additional expense and the nuisance of delivery to trucks as justification for the differential. However, no differential was charged at certain times when delivery by railroad was hampered by car shortages and by a switchmen's strike. (R. 35180)

188. Trucking from the Buffington plant of Universal Atlas Cement Company into Michigan (in trucks controlled by Universal Atlas Cement Company) is made only to

certain counties in southwestern Michigan, to which the company found it cheaper to truck from Buffington than from its Muskegon, Michigan, warehouse. This trucking from Buffington began in June, 1934. (See Resp. Exh. 2518; R. 35181-82)

189. There was some trucking of cement from the Universal mill of Universal Atlas Cement Company (Pittsburgh) in the 1920's due to the car shortage above referred to, but this was not substantial until trucking became a custom from a competitor's plant in Pittsburgh. (R. 35184) The inauguration of trucking by this competitor in Pittsburgh caused Universal Atlas Cement Company to establish a warehouse nearer the center of Pittsburgh than its mill, which was sixteen miles out from the city, and this was done in 1931. (R. 35184)

190. That warehouse in Pittsburgh required an investment of around $200,000. (R. 35184)

191. The price to the customer in his trucks f.o.b. warehouse of Universal Atlas Cement Company in Pittsburgh was the same as the price base f.o.b. mill of Universal Atlas Cement Company, without nay differential added thereto. (R. 35185)

192. Late in 1931, Universal Atlas Cement Company stopped loading customers' trucks at the Universal mill and at the warehouse which had been built in Pittsburgh. (R. 35185)

193. The reason Universal Atlas Cement Company stopped trucking from its Universal mill and its Pittsburgh warehouse in late 1931 was because there had been a growing demand from dealers there that trucking be stopped. (R. 35186) For example, Universal Atlas Cement Company received a request from dealers to quit trucking, similar or identical to that shown on FTC Exh. 1043 RR. (R. 35186)

194. Dealers stated to Universal Atlas Cement Company that they feared the establishment of warehouses such as Universal Atlas Cement Company had established, together with warehouses of other cement manufacturing companies, would sooner or later put the dealers out of business. (R. 35188)

195. The discontinuance of trucking by Universal Atlas Cement Company in Pittsburgh was made without any

agreements or conversations with competitors regarding the matter. (R. 35189)

196. Universal Atlas Cement Company discontinued trucking at Pittsburgh after the company had seen notices to the effect that competitors were discontinuing trucking there. (R. 35189)

197. After December 1, 1931, the only trucking in Pittsburgh from Universal Atlas Cement Company's mill or warehouse was on old contracts booked before the date of the announcement discontinuing trucking. (R. 35193)

198. In some places the railroads have extremely low rates for hauling cement for certain distances, which make it unprofitable for dealers to attempt to haul cement in their own trucks from the mills. For example, there are short-haul rates in the State of Texas under which the railroads haul cement at a rate of four cents per cwt. up to twenty miles from the mill, such rates increasing by gradations to ten and one-half cents for distances from seventy to seventy-five miles from the mills. (R. 35062)

199. Cement dealers generally object to trucking of cement because such practice frequently permits cement to be brought into the dealer's town and sold at a price less than the price which the dealer has to pay to the cement manufacturer.

200. This was illustrated by an example cited by Mr. Reiter and which occurred while he was Sales Manager of the Missouri Portland Cement Company. In that case truckers bringing livestock into St. Louis and who otherwise would return with empty trucks, began the practice of stopping at St. Charles, Missouri, on the empty back-haul and buying cement from a St. Charles dealer. The truckers would then haul this cement back into the interior of Missouri and sell it at various towns at very low rates, which they felt they could do because otherwise they would be going back empty. Since the price of cement delivered in St. Charles, Missouri, was lower than the price delivered in these interior towns, the dealers in the interior towns threatened to quit buying cement from the Missouri Portland Cement Company. (R. 4136-38)

201. That might cause the company to lose a dealer who would normally buy several carloads a year because a trucker might deliver to a customer a few sacks of cement. (R. 4141)

Other possible methods of selling cement and objections thereto.

202. Instead of selling cement at destinations prices, as has been done for many years, cement might be sold f.o.b. mill at the same price to all customers, or might be sold f.o.b. mill at varying prices, which with freight added to destination would meet competition at the point of delivery; or perhaps cement might be sold by some helter-skelter method of selling by which the salesman in the field would match wits with the customer and get the highest price out of him that he could. (R. 34889-90) This last method would be impractical for any company having a large sales area and numerous salesmen.

203. There might be an additional alternative which would in substance be an option to the buyer to buy at delivered prices or f.o.b. mill. (R. 34890)

204. If Universl Atlas Cement Company were required to sell f.o.b. mill at the same price to all customers, its sales would be confined to the territory around each mill within the boundary that would be determined by the difference between its price, plus freight rate, and the price, plus freight rate, of other mills, and its sales would be confined to that territory where its price, plus its freight rate, was the lowest. (R. 34894)

205. The company would be subject to fluctuations of demand in such territories and if the demand fell off the company would be precluded from reaching out beyond the described territory to more distant territories. (R. 34894)

206. The company would have a monopoly as against competing companies in that territory in which the company could sell. (R. 34894) The same would be true with competitors. That is, they would have a monopoly in their own territories except in territories where there were two or more mills, as in the Lehigh Valley and in Kansas Gas Belt, for example. (R. 34895) Service to customers in such situations would probably be poorer and prices higher than where there is competition. (R. 34895-96)

207. In areas like Lehigh Valley the result of an f.o.b. mill system would be very bad because these mills have such a large production that they are compelled to reach

out beyond the territory where their freight rates are lowest, into more distant territories. (R. 34896)

208. In such areas as the Lehigh Valley, the result of an f.o.b. mill system by which the same price was charged to all customers be cut-throat competition, and likely lower prices until the mills reached a point of exhaustion and, thereafter, prices would probably rebound higher than before. (R. 34896)

209. If sales were made f.o.b. mill at variable prices, that is, at different prices to different customers, depending on the destination of those customers, that would in effect amount to meeting competition at destination, the same as under the present method of selling at destination prices. (R. 35897)

210. It would, however, be a very awkward method of pricing to name different prices to different customers, f.o.b. mill, in order to meet competition at points of destination. (R. 34897)

211. Another objection to variable f.o.b. mill pricing is that it would permit some dealers in towns to obtain discriminatory prices as compared with other dealers in the same town by misrepresenting the destination to which they intended to take the cement. (R. 34897) Most dealers are opposed to f.o.b. mill selling. (R. 8026, 8033)

212. A compulsory method of selling f.o.b. mill at the same price to all customers would definitely reduce the sales volume of such mills as the Waco, Texas, mill of Universal Atlas Cement Company because there would be a very definite area in which that mill could sell under such a system, in which the consumption is not enough to keep the Waco mill going. (R. 34904)

213. It is questionable whether prices of cement sold from the Waco mill could be increased enough to offset the loss through reduced volume. (R. 34905)

214. An objection to the method of selling which would give the customer the option to buy either at destination prices or f.o.b. mill is, that in many cases the customer would tend to buy f.o.b. mill from a nearby mill and this would place the more distant mill at a disadvantage. (R 34905) The disadvantage would lie partly in the fact that the distant mill would ship only in carload lots, while the customer could buy f.o.b. mill from the nearby mill in small lots. (R. 34906)

215. This would result, in the course of time, in the customer confining his purchases to small lots f.o.b. the nearby mill. (R. 34906)

216. For example, Universal Atlas Cement Company's mill at Waco, Texas, sells a considerable quantity in Dallas, Texas, where competing mills are located. Under the optional method now being discussed, customers in Dallas would tend to buy in small quantities from local Dallas mills rather than in car lots from the Waco mill. (R. 34906) This would result in substantially eliminating the Waco mill from sales in Dallas and confining the Waco mill's sales to the territory in which it had the freight advantage and in which territory consumption is not enough to support the Waco mill. (R. 34907)

217. If the company tried to meet such a situation by lowering its price from its Waco mill, the Dallas mills would likely lower their prices. It would be practically an impossible situation. (R. 34907)

218. Another way to meet such a situation would be for the company to build warehouses in Dallas at large expense, ship the cement to the warehouses from the Waco mill, and then sell the cement to the Dallas customers from the warehouses in small lots. That would involve double handling and expense and ultimately higher prices to the buyer. (R. 34908)

219. Such a result as has just been discussed has been demonstrated in other parts of the country, for example, Washington, D. C., where there is a great amount of duplication of facilities for handling cement. (R. 34808)

220. Resp. Exhs. 2467 and 2469 show the area around each mill or group of mills in the State of Texas where the freight rates are lower than the freight rates from any mill outside that area. The zones around these Texas mills shown in varying colors on Resp. Exh. 2469, are the areas to which the mill or mills would be confined if the mills were required to sell cement f.o.b. mill at the same price to all customers and if that f.o.b. mill price was the same at all Texas mills.

221. Resp. Exhs. 2470 and 2471 are a map and a print thereof, respectively, showing the zones around each mill or group of mills in the State of Texas in which the price base existing when the map was drawn, plus the freight from the mill to any point within the zone, made a total

sum less than the price base plus freight from any mill outside the zone. In other words, Resp. Exh. 2471 shows the zones around each mill or group of mills in the State of Texas to which such mill or mills would be confined in making sales if such mills were required to sell f.o.b. mill at the same price to all customers and if such sales were made f.o.b. mill at the price base in effect at the respective mills on the date the map was prepared.

22. Resp. Exh. 2468 A-R shows all railroad stations in the State of Texas to which there were equal freight rates from two or more mills at the time Resp. Exh. 2467 was drawn, and Resp. Exh. 2472 A-N shows all railroad stations in the State of Texas to which an equal destination price for cement would be made from two or more mills on the date the map (Resp. Exh. 2471) was drawn. These maps were made and reflected conditions in the State of Texas in July, 1939, and were introduced. (R. 35049-57)

223. Universal Atlas Cement Company prepared an analysis of all its shipments of cement from its Waco Texas, mill to the various zones shown on Resp. Exh. 2469, and also to all stations in Texas where freight rates from two or more mills were equal, as shown on Resp. Exh. 2468 A-R. This analysis covered the period from July 1, 1929 to June 30, 1939, by calendar years. (R. 35462; Resp. Exhs. 2533, 2534 A-C)

224. On Resp. Exh. 2469, the area colored purple is the zone in which all points have a lower freight rate from the mill of the respondent at Waco than from any other mill. The shipments made from the Waco mill to all points within that purple zone appear on Resp. Exh. 2533 in columns for the various years, opposite the designation "Waco" which appears at the left bottom corner of Resp. Exh. 2533. For example, Resp. Exh. 2533 shows that from July 1 to December 31, 1929, the Waco mill shipped 110,746¼ barrels to points in the Waco zone and in 1930 respondent shipped from its Waco mill into the same zone, 113,400¼ barrels. The exhibit (Resp. Exh. 2533) likewise shows the shipments from the Waco mill in barrels to each other zone shown on the map (Resp. Exh. 2469). (R. 35467-72)

225. Resp. Exh. 2533 represents shipments within the zones shown on Resp. Exh. 2469, while Resp. Exh. 2534

A-C shows the shipments to neutral freight points, being the stations located on boundaries between the zones shown on Resp. Exh. 2469 and any other stations that happen to carry an equal freight rate from two or more mills.

226. Resp. Exh. 2533 shows that the shipments from the Waco mill into the Waco zone fluctuated during the years 1930 to 1938, inclusive (being the full calendar years referred to on the exhibit) from a low of 65,770¼ barrels in 1934 to a high of 183,948 barrels in 1933. 1929 and 1939 figures are for half years only.

227. The exhibit likewise shows great yearly fluctuations in the amount of total cement shipped throughout the State of Texas from the Waco mill.

228. The capacity of the Waco mill to produce cement is approximately 900,000 barrels per annum. (R. 35499)

229. Testimony of a Universal Atlas Cement Company representative demonstrates that the area in Texas to which the Waco mill of respondent could ship cement under such an f.o.b. mill system is an area in which the consumption is too small to support the Waco mill. (R. 35499-505)

Membership of Universal Atlas Cement Company in The Cement Institute.

230. Universal Atlas Cement Company was not a charter member of The Cement Institute. It first joined The Cement Institute on June 15, 1933, after enactment of the NIRA. (R. 34768; Resp. Exh. 2173 A-E)

231. The Code of Ethics of the Institute (FTC Exh. 138-1—138-8) was abolished by The Cement Institute by action of its trustees at the time Universal Atlas Cement Company became a member. (See FTC Exh. 605 A-C; Resp. Exh. 2174 A-D; R. 34769)

232. Members of the industry who did not belong to The Cement Institute had the same degree of uniformity in practices and in pricing as did those respondents who belonged to the Institute and that membership in the Institute was not the cause of such uniformities in pricing and sales policies as the record shows to exist. (R. 8532, 8576-77, 8775, 12771-74, 13261-67, 13274, 34779-93, 35363-

85, 36782-83; FTC Exhs. 3145 C, 3159 C, 3161 B; Resp. Exhs. 1429 A, 2509 A, 2730 E, 2731, 3363, 3366-67)

Cement Institute Compendium of Established Terms and Marketing Methods.

233. The Compendium (FTC Exh. 561) grew out of several meetings of the Trade Practice Committee of The Cement Institute, held shortly after the NRA was declared unconstitutional. (FTC Exh. 591 A-E, F-H, I-J) These meetings were held in July, August and September, 1935. (R. 34774-75)

234. There was no understanding or agreement at the meetings of the Trade Practice Committee out of which the Compendium evolved that anyone was to be bound by its terms. There was nothing new in the Compendium. It was merely a statement of practices that had prevailed for a long time among most members of the industry. The practices stated in the Compendium were the same practices Universal Atlas Cement Company had been engaging in for a long time. (R. 34777) B. F. Affleck, a witness for Universal Atlas Cement Company, was interrogated separately as to each provision of the Compendium and replied in substance that all of the provisions of the Compendium set forth standards of practice which had long been engaged in by his company. (R. 34779-94) The Compendium was not distributed by Universal Atlas Cement Company to its salesmen because it did not represent anything new as far as the company was concerned. (R. 34795, 35072)

Unversal Atlas Cement Company percentage of capacity and production.

235. Resp. Exh. 2530 is a tabulation showing the cement manufacturing capacity and clinker production of all cement companies east of the Rocky Mountains for each of the years 1925 to 1938, inclusive, divided by United States Bureau of Mines Districts 1 to 9, inclusive, and also showing Universal Atlas Cement Company capacity and clinker production for the same period by years. The tabulation also shows the percentage of Universal Atlas Cement Com-

pany capacity and production to that produced by all companies.

236. Resp. Exh. 2531 is a graph of the same information contained on Resp. Exh. 2530. These exhibits were introduced into evidence, as shown by the record, at pp. 35329 and 35330, respectively.

237. The tabulation and graph (Resp. Exhs. 2530 and 2531) show that the production of Universal Atlas Cement Company fluctuated violently from time to time compared with its percentage of capacity in various United States Bureau of Mines Districts.

PART B.

The Findings As To The Facts And Conclusion And The Cease And Desist Order Issued By The Commission Are Incorrect, Incomplete And Erroneous In The Following Particulars.

1. The Finding of the Commission that said proceeding is in the interest of the public is not supported by the evidence.

2. Paragraph Two of the Commission's Findings is insufficient and incomplete in failing to find and specify the cement companies with whom this petitioner competes and in failing to find and specify the cement companies with whom this petitioner does not compete.

3. Paragraph Four of the Commission's Findings is immaterial and irrelevant and is highly inflammatory and prejudicial in that it attempts to create an inference of wrong-doing by the cement companies because some few of them are large companies producing substantial percentages of the total production of the cement industry; and said paragraph of the Commission's Findings is further prejudicial in that it attempts to create an inference of illegal action on the part of the cement companies because most of the cement manufacturers belonged to a trade association, to-wit, The Cement Institute, at the time this proceeding was begun before the Commission.

4. Paragraph Five of the Commission's Findings is incomplete and misleading by reason of its failure to

specify which cement companies in the proceeding before the Commission were, at the various times mentioned, members of the various trade organizations and associations mentioned in said Paragraph Five of the Commission's Findings. Said paragraph is further misleading in failing to point out that Universal Atlas Cement Company was not at any time a member of the Association of Licensed Cement Manufacturers or of the Cement Manufacturers Protective Association, referred to in said Paragraph Five of the Commission's Findings.

5. Paragraph Six (a) of the Commission's Findings is not supported by the evidence in so far as it finds "that the cement industry has evidenced a strong aversion to free competition and that its members have, by understandings and agreements, developed and maintained substantial uniformity of action among themselves with respect to practically every marketing procedure which involves price or other competition." Said Paragraph Six (a) of the Commission's Findings is incomplete and misleading in failing to find that the uniformity of action among cement manufacturers to the extent it exists has been brought about by competition in the marketing of the product, to-wit, standard cement, which product, although manufactured by different manufacturers, is so similar in its composition and in the effective use which may be made thereof, that buyers of cement refuse to pay even one cent per barrel more for one brand of standard cement than for another and buyers of cement refuse to buy standard cement from any seller who will not offer terms and conditions in all respects as favorable as those offered to the buyers by some competitive seller. (See Part A, Paragraphs 1-3) Said Paragraph Six (a) of the Commission's Findings is further incomplete in failing to specify which cement companies entered into the alleged understandings and agreements referred to in said Paragraph Six (a) of the Commission's Findings.

6. The Finding of the Commission in Paragraph Six (b) that there is a "belief now generally held by respondents [cement companies] that free and open competition is impracticable for the cement industry," is not supported by the evidence, and is an immaterial Finding. Commission's Exh. 7 B referred to in said Paragraph Six (b) of the Commission's Findings (being a quotation from

a letter written by John Treanor in 1934) is not competent to bind the petitioner herein or other cement companies but said letter was improperly admitted into evidence over objections at a time after the writer thereof was deceased and not subject to cross-examination as to the precise meaning of the language used by him in the letter. Therefore, said letter does not constitute substantial evidence to support the Commission's Finding. (See *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229-30)

Said Paragraph Six (b) of the Commission's Findings is further incomplete and misleading in failing to point out that the Commission's theory is that unless prices from various sellers differ, there is an illegal restraint of competition. Said Paragraph Six (b) of the Commission's Findings is further incomplete and misleading in that it refers to a large order of 365,000 barrels where the bids of competing companies were identical. The Finding of the Commission creates an inference of collusion in arriving at such identical bids, but fails to point out that the particular bids in question were the subject of evidence in this case and the evidence shows without contradiction that the bid of Universal was made without collusion or even contact with any competitor, although the bid of Universal was in an identical amount as the bid submitted by other cement companies seeking to secure said order. Universal says that it is improper and erroneous for the Commission thus to pick fragments from the testimony and create thereby an inference of collusion when such inference of collusion has been overcome by uncontradicted evidence in the record. Detailed explanation of the evidence with respect to this large order will be set out in Universal's brief. This is the bid to the Bureau of Reclamation on February 10, 1936, for Hamilton Dam referred to in Part A, Paragraphs 83 to 116 of this Statement of Points.

Said Paragraph Six (b) of the Commission's Findings is further misleading in that it creates an inference that an intent or purpose on the part of Universal to quote prices as low as those which Universal finds are being quoted by its competitors but no lower, is an illegal purpose or intent, whereas the Commission should have found that any seller has the right to determine his own price and to quote the same price he finds is being quoted by other sellers so long as he does not do that by collusion or agreement with his competitors.

7. Paragraph Six (c) of the Commission's Findings is incomplete and misleading in that it fails to point out that at all times numerous variations from uniformity in price and other conditions have been made by various cement companies, although uniformity in price and trade practices is usually to be found in connection with sales of cement, and in failing to find that numerous variations from uniformity are sufficient to destroy any inference of collusion and agreement arising from uniform practices to the extent that they exist. (R. 8637-38, 8717-18, 8761-62, 11964-66, 38303, 39636, 40629-30, 47900)

8. Paragraph Seven (a) of the Commission's Findings is incomplete and misleading in that it conveys an inference of agreed and collusive action, while it should have pointed out that buyers of cement, as shown by the uncontradicted evidence, refuse to pay more for one manufacturer's brand than for another brand in total costs at the buyer's destination because cement is so standardized that buyers have no preference for one cement over another to a degree that would induce a buyer to pay more for one brand than for another. The Commission should have further found that buyers generally desire price quotations on a delivered basis because of the unwillingness of buyers to pay, in total costs at destination, more for one brand than for another. (See Part A, Paragraphs 1-4) The Commission should have further found that Universal's practice in pricing its cement is to add to Universal's price base at its shipping mill, rail freight from the shipping mill to the customer's destination; that the total cost at destination to Universal's various customers for cement shipped from a particular mill of Universal differs, therefore, in an amount accurately reflecting the difference in rail freight from the shipping mill to the destination except at destinations where Universal finds some competing company is quoting cement at a price lower than that made by Universal in the way just described, in which event Universal either quotes as low a price as its competitor or fails to sell any cement because of the fact that buyers will not pay more for Universal's cement than for the cement manufactured by its competitors. (See Part A, Paragraphs 6-8, 15-24)

The Commission should have further found that the evidence shows without contradiction that witnesses on behalf of Universal testified that this method of pricing

above described has been determined by Universal without agreement or collusion with its competitors but solely by independent action of Universal in its effort to sell its cement at various customer destinations. (See Part A, Paragraphs 6, 31, 36-45) The Commission should have further found that all buyers of cement, including Government purchasing agencies, without exception, refuse to purchase cement from any seller whose delivered price (total cost to the customer at destination) exceeds that of any other seller. The Commission should have further found that frequent uniformity of cement prices at destinations of customers is the result of the effort of sellers to quote prices as low as those quoted by any competitor and that this effort is the result of the fact that buyers refuse to pay more for one brand than for another, and that this effort of sellers to meet the lowest prices quoted is not obligatory upon sellers by reason of any agreement or collusion, but is forced upon sellers by the economic fact above mentioned that cement cannot be sold to any buyer unless the price is as low as that quoted by any other seller. (See Part A, Paragraphs 1-7, 18-24)

The Commission should have further found that the meeting by Universal of a lower price made by some competitor is not a violation of any law, but is particularly authorized and permitted by the Robinson-Patman Act.

9. Paragraph Seven (c) of the Commission's Findings is incomplete and states a half truth by failing to find that non-base mills do not attempt to make their own prices but, instead, meet destination prices quoted by other mills and in failing to find that there is no law requiring a non-base mill to establish its own prices. Paragraph Seven (c) is further incomplete in that it creates an inference of illegality on the part of non-base mills, apparently on the theory that their action in quoting prices equal to prices made by other mills is the result of collusion and agreement, although there is no direct evidence in the record to support such inference and numerous witnesses for non-base mills denied any such collusive or agreed action. (R. 5127, 13595-600, 24328-29, 25492, 39962-63) It is evident that the Commission's Findings are stated in a way to support the inference of collusion and agreement which the Commission finds it necessary to arrive at upon which to predicate its Cease and Desist Order. Such inferences are improper in view of the uncontradicted

evidence in the record by Universal and by other cement companies that their uniform prices and uniform practices to the extent that they are uniform, result from the necessity of having prices and terms as favorable to the buyer as any other seller's prices and terms in order to sell cement. (See Part A, Paragraphs 1-27, 45, 46)

10. Paragraph Seven (d) of the Commission's Findings is incomplete and misleading in that it creates an inference that basing points and price bases are established by agreement among cement companies, whereas the evidence is clear and uncontradicted to the effect, and the Commission should have found, that every basing point in the industry has been established by individual action of some particular company (R. 13742, 23847, 30018-19, 35805-06, 47900) and that thereafter other companies, in their efforts to sell cement, have been forced to name prices not higher than those made by the company establishing such basing point because of the fact that buyers will not pay more for one brand of cement than for another, and that the uniformity of price which has frequently resulted therefrom is not due to collusion or agreement but to the individual action of cement sellers in meeting the lowest price quoted by any seller. For example, if Universal should determine to use Jacksonville, Florida, as a basing point and establish a price base there, although Universal has no mill there, and if Universal should then make up its delivered prices to all destinations near Jacksonville by taking such Jacksonville price base, determined by Universal, and adding thereto the amount of freight from Jacksonville to the destination in question, any other cement seller wishing to sell in such destinations and who had theretofore quoted a higher price at such destinations, would thereafter be unable to sell any cement unless he reduced his price to a figure at least as low as the destination price quoted by Universal at the destination in question. When such competing seller did this, he would do so not by reason of collusion or agreement but because he could not sell cement otherwise. This meeting of prices in this way is what the Commission considers to be illegal restraint of price competition.

11. Paragraph Seven (e) of the Commission's Findings is incomplete and misleading in that it creates an inference that all cement companies, including Universal, have maintained arbitrary variations with respect to basing

points. Such an inference is not supported by the evidence and the Commission should have found, as the evidence proves without contradiction, that the establishment of any particular basing point and the price base thereat has not been the result of agreement among cement companies but has been the result of individual action. (R. 13742, 23847, 30018-19) For example, the establishment of Ironton as a basing point and the price base used from such basing point in sales south of the Virginia-North Carolina line and the different price base used in sales north of that line was the individual action of the cement company owning the mill at Ironton. Nevertheless when the cement company owning such mill at Ironton did establish such price bases, other cement companies were compelled to make prices at destinations near such basing point at least as low as those made by the company owning the Ironton mill, or otherwise such other companies would be unable to sell cement because of the fact that buyers would not pay more for the cement of any other company than for the cement produced by the company owning the Ironton mill.

Paragraph Seven (c), (d) and (e) is further misleading in that the Commission should have found that this petitioner, Universal, has no so called non-base mill (see Part A, Paragraph 6), maintains no dual bases, and that nothing in said Paragraph Seven (c), (d) and (e) applies to Universal.

12. Paragraph Seven (f) of the Commission's Findings is misleading in that it infers that cement companies frequently meet the prices of other companies by reason of collusion and agreement in an effort to produce identical prices, whereas the Commission should have found that cement companies frequently meet the prices of other companies because a higher price quoted by any cement company would never succeed in effecting a sale since buyers will not pay more in total costs at destination for one brand of standard cement than for another brand. (See Part A. Paragraph 1-6, 18-24.) The Commission should have further found that numerous witnesses for cement companies testified, and that there was no testimony to the contrary, that cement manufacturers do not customarily quote lower prices than those quoted by their competitors because to do so would only lower the general price level, since in such event all other competitors at-

tempting to sell would be forced, in turn, to lower their prices in order to effect sales of cement to buyers unwilling to pay more for one brand of cement than for any other brand. (R. 37300-05, 40013-14, 39855-56, 26193, 28194-95.)

13. Paragraph Seven (h) of the Commission's Findings is misleading in that it attempts to create an inference that all cement companies, including Universal, follow an agreed formula for the purpose of arriving at identical prices at any given destination. Here again the Commission's Finding fails to point out the most important fact in the record in this case, that fact being that buyers refuse to pay more for one brand of standard cement than for any other brand and that this economic fact compels sellers, without collusion, to attempt to quote as low as the lowest quotation of any seller. If a seller attempting to get a destination price made up of its price base plus freight to the destination thus makes a total destination price lower than other competitors would like to get at the destination in question, and if in such event other sellers then offer an equally low price, the Commission implies that all sellers are thus using an agreed formula, whereas the Commission should have found that other sellers are merely meeting the lower price which they found at the destination. (See Part A. Paragraphs 1-24, 45, 46.) The Commission has failed to recognize the obvious business necessity of quoting a price as low as that of any competitor in order to sell cement.

Paragraph Seven (h) is also misleading in that it fails to point out that any lower price named by a particular company, whether or not made up of a price base plus freight, will compel all other competitors to quote just as low if they desire to sell cement. (See Part A. Paragraphs 9-13.) There is no evidence to support the statement of the Commission in Paragraph Seven (h) of its Findings that the method of selling generally used by cement companies "came into existence and its territorial application was extended from time to time as a result of understandings and agreements among cement manufacturers." The Commission should have found that with the development of the industry into numerous units competing for sales at various destinations, the refusal of buyers to pay more for one brand of cement than another produced the frequent phenomena of identical prices from various sellers.

14. Paragraph Seven (i) of the Commission's Findings is irrelevant and immaterial and does not tend to prove any combination or agreement among the cement companies to use what the Commission calls a "multiple basing point delivered price system." The quotations in Paragraph Seven (i) of the Commission's Findings are from unauthenticated minutes of meetings of an association during the years 1904-08 before the statutes were enacted on which this suit is based. The quotations at the most show merely dissatisfaction with the level of prices then existing and do not intimate or suggest any agreement with respect to a method of pricing. These minutes from ancient meetings were not authenticated, were objected to and were improperly admitted into evidence. There was no opportunity to cross examine the parties who made them with respect to the substance thereof, and they do not constitute evidence on which the Commission's Findings may properly be based. (*See Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229-30.)

The Commission further fails to point out which cement companies were members of the Association whose proceedings during these early days were referred to in Paragraph Seven (i) of the Commission's Findings. The isolated expressions of individuals taken from these minutes are too remote in point of time to be substantial evidence that the cement companies in this case are pursuing their pricing or other practices through collusion and agreement.

15. Paragraph Seven (j) of the Commission's Findings refers solely to a patent license agreement which was canceled January 1, 1911, and is therefore entirely incompetent and irrelevant and does not constitute substantial evidence to prove any of the allegations of the complaint in this case.

16. Paragraph Seven (k) of the Commission's Findings is irrelevant and immaterial and does not prove any of the allegations of the complaint in that it refers to activities in the year 1910, which was prior to the time of the enactment of the Federal Trade Commission Act or the Clayton Act under which this proceeding is brought. Furthermore, the activities referred to in said paragraph are too remote to constitute substantial evidence of any collusive action or agreement among the cement companies in this suit.

17. Paragraph Seven (l) of the Commission's Findings refers to activities in the year 1915 and is too remote to prove any present collusive arrangements or agreements among the cement companies and, particularly, is of no force or effect to prove that Universal carries on its business or any part thereof as a result of collusive action with its competitors.

18. Paragraph Seven (m) of the Commissioner's Findings is immaterial and irrelevant and does not tend to prove that Universal carries on its business by collusion or agreement with anyone. The Commission's Finding in said Paragraph Seven (m) recognizes that many prices in California are not made under the basing point method but, instead, are zone prices, where a price applies to a certain zone or area. The Finding is incomplete in failing to point out that Universal does not sell in California.

19. Paragraph Seven (n) of the Commission's Findings is incompete in failing to point out that Universal does not sell in the State of Washington and in failing to specify what cement companies do sell there.

20. Paragraph Seven (o) of the Commission's Findings is incomplete and misleading in failing to point out that Universal and many other cement companies did not belong to The Cement Institute during the time its Code of Ethics was in existence and, further, for its failure to find that the Code of Ethics of The Cement Institute was abolished by formal action of The Cement Institute in 1933. (See Part A, Paragraphs 230-31.) Said paragraph is further misleading in failing to find that Universal never agreed with any other cement company as to the position Universal would take with respect to permitting diversions in transit by its customers and that Universal's position with respect to diversions was established by it independently of any other cement company. (R. 23335, 29538, 30627, 33575-6, 36237, 36953, 41553.) The Commission should have further found that it is illegal for a customer to cause a diversion in transit of a shipment of cement which has been shipped f.o.b. destination and which is, during such shipment, the property of the seller. The Commission should have further pointed out that various railroads have recognized the right of the shipper of such property to control it during shipment by authorizing the shipper to place upon the bill of lading a so called

"no diversion stamp," which, in effect, prohibits diversion in transit by the buyer except with the shipper's consent. (R. 23332-5, 38991, 28092, 38246-7.)

21. Paragraph Seven (p) of the Commission's Findings is incomplete and misleading in that there is no substantial evidence to support the Finding that The Cement Institute was organized to maintain, or that it has effectively supported and maintained, the method of selling cement which is customary in the industry and which the Commission calls the "multiple basing point system of delivered prices." Here again the Commission has failed to find what it should have found, to-wit, that economic forces already mentioned in this Statement of Points, *i.e.*, standardization of the product, desire of buyers for quotation of prices at their destinations and the refusal of buyers to pay more in total cost at destination for one brand of cement than another, were the compelling forces which caused sellers frequently to quote identical destination prices. (See Part A, Paragraphs 1-24.)

The Commission should have found that these economic forces made it reasonable for the Code promulgated under the National Industrial Recovery Act to refer to those customary and established methods of doing business, including the general disfavor of many companies in the industry toward permitting buyers of cement shipped f.o.b. destination to divert the same in transit for the purpose of enabling the diverting buyer to gain advantage over his competitors and for other illegal purposes which will be fully explained in Universal's brief.

Paragraph Seven (p) of the Commission's Findings is misleading for the further reason that the last sentence of said paragraph which states that the multiple basing point system was continued during the NRA Code period is an attempt to create an inference of illegality, whereas the Commission should have stated that this continuance of the multiple basing point system during NRA merely means that members of the cement industry continued during that period to sell at the best price they could get, *i.e.*, the basing point mills attempted to get destination prices made up of their price base plus freight, and when unable to get that price they met the lower price made by some competitor. The Commission should have further found that this practice of the industry, both before, during and after NRA days, was not the result of collusion but was

the result of the economic factors hereinabove mentioned which may be expressed in the statement that buyers would pay no more for one brand than for another.

22. Paragraph Seven (q) of the Commission's Findings is incomplete and misleading in failing to point out that there is uncontradicted evidence in the record that the "Compendium of Established Terms and Marketing Methods" referred to was not an agreement among cement companies and that Universal and other cement companies were not obligated or bound thereby and that said Compendium was merely a statement of what were considered to be the best practices in the industry, and that it was in fact a statement of methods then most generally being used in the industry. (See Part A, Paragraphs 233-34.)

The Commission should have further found that if Universal or any other cement manufacturer had permitted the customers to make diversions in transit of cement which had been sold f.o.b. destination, such diversions would have been a method of effecting illegal discriminations among buyers. (R. 23302-03, 32774-75, 37641-44, 38233, 42880.) The Commission should have further found that some buyers on infrequent occasions have attempted to divert shipments in transit but only when such diversion, if accomplished, would enable the diverting customer to obtain the cement at destination to which the diversion is made at a lower total cost than if the customer had bought the cement originally for delivery at such destination to which the diversion was made. The Commission should have found that when cement is sold f.o.b. destination, diversions in transit by the buyer without seller's consent are illegal, unfair to the diverter's competitor's, and a fraud upon cement sellers.

23. Paragraph Seven (r) of the Commission's Findings is incomplete and misleading in that it creates an inference that there was an agreement on the part of the cement companies, including Universal, to refuse to sell f.o.b. mill to Government agencies and that there was an agreement on the part of cement companies to sell only according to the method of selling which the Commission terms a "multiple basing point delivered price system." The Commission should have found that a general practice in the cement industry of selling f.o.b. mill would create

chaos and ruin to many units in the industry, would cause many mills to fail, and would cause monopolistic areas to be built up around each mill in which such mill would be the only seller of cement. (See Part A, Paragraphs 202-29.) Illustration of the havoc which would be wrought in the industry by a general method of selling f.o.b. mill will be made in Universal's brief. The Commission should have found that where there was a refusal to sell cement f.o.b. mill, such refusal was arrived at by individual determination and not by agreement or collusion. The Commission should have further found that Universal, despite its refusal to adopt a general method of selling f.o.b. mill, has frequently quoted the Federal Government f.o.b. mill in instances where the Federal Government, by taking title to the cement at the mill, would be enabled to ship the cement on a land grant freight rate or other special low freight rate. (See Part A, Paragraphs 58-119.)

24. Paragraph Eight (a), (b), (c), and (d) is misleading and incomplete in that it fails to point out that this petitioner, Universal, never used any common freight rate service which was also used by other cement companies until 1936, and that prior to that time Universal always made up and used its own freight rate books; that Universal changed its practice in the year 1936 and since that time has used The Cement Institute freight rate books solely for reasons of economy. (See Part A. Paragraphs 47-49.) The Commission should have further found that such freight rate books are merely compilations from various railroad tariffs showing the lowest railroad rates applicable between indicated points. (See Part A, Paragraph 50.) The Commission should have further found that the same degree of identity in destination prices on the part of Universal and other cement companies existed before 1936 as thereafter and that, therefore, the use by Universal since 1936 of The Cement Institute freight rate books was not a factor producing identical prices between Universal and its competitors. (R. 4034-35, 13713, 13899-901, 14439-40) The Commission should have found that Universal had not agreed to use The Cement Institute books for the purpose of attaining uniformity in price and the Commission should again have found that such uniformity in price as exists is the result of economic factors heretofore mentioned in this Statement of Points, principally the

refusal of buyers to pay more for one brand of cement than for another.

25. Paragraph Eight (e) of the Commission's Findings is misleading in that it creates an inference that the practice of dropping or adding fractions of a cent to the railroad freight rate per barrel of cement was inaugurated with the use of The Cement Institute freight rate books. The evidence does not sustain any such inference and, on the contrary, proves without contradiction that for many years long before any common freight rate service was used by any of the cement companies, it had become a trade practice in the industry, naturally and because of competitive forces, to compute freight rates per barrel of cement to the nearest cent for purposes of quoting prices. (See Part A, Paragraph 52; R. 23271, 2700-01, 37753, 38211-12, 38477-78) For example, if a railroad freight rate for shipping cement between two points happened to be 17 cents per hundred pounds, obviously a barrel of cement in cloth sacks (weighing 380 pounds) would carry a total freight charge of 3.8 times 17 cents or 64.6 cents, which according to the practice in the industry for many years would be considered 65 cents. If the freight had amounted to 64.3 cents, then for quoting prices, the freight charge would be considered 64 cents. The Commission should have found that there is nothing illegal in the fact that Universal and other cement companies follow this ancient practice of adding or dropping fractions to permit price quotations in an even number of cents.

26. Paragraph Eight (f) of the Commission's Findings is incomplete in that it fails to state that The Cement Institute freight rate books do show the lowest freight rate from all points of production from which any appreciable amount of cement is shipped, including all basing points, whether or not those basing points are points at which cement is manufactured or whether or not those points are points from which shipments are made, and the Commission should have further found that in so far as said freight rate books failed to show freight rates from producing mills which were not basing points, it would have served no purpose for The Cement Institute freight rate books to show the freight rates from such producing mills, since those mills were not at the time attempting to make prices but were merely quoting delivered prices

which they found other mills had made at various destinations.

27. Paragraph Eight (g) of the Commission's Findings is incomplete in that it fails to state that the use of freight rate books showing the same information as is contained in The Cement Institute freight rate books for pricing purposes was held to be legal and proper by the United States Supreme Court in the case of *Cement Manufacturers' Protective Association* v. *United States*, 268 U. S. 588.

28. The statement in Paragraph Eight (h) of the Commission's Findings that "Respondents extended their cooperative rate dissemination activity to land grant rates for the same purpose as existed with respect to commercial rates discussed above," is not supported by the evidence.

29. The last sentence of Paragraph Eight (i) of the Commission's Findings is misleading and incomplete in that it creates an inference that this petitioner, Universal, was a member of a group of cement companies having understandings and agreements as to freight rates to be used or prices to be bid. The Commission should have found that there is no evidence in the record to show that this petitioner, Universal, had at any time any understandings or agreements with any cement companies as to land grant rates or other rates to be used or as to prices to be bid by Universal.

30. Paragraph Eight (k) of the Commission's Findings is incomplete and misleading in failing to find that some one cement manufacturer filed a bid with the Code Authority during NRA containing what has since become known as a "control clause" similar to that set out in Paragraph Eight (k) of the Commission's Findings. (R. 3051, 47593) The Commission should have found that other companies learned of this method of bidding and later used it because it gave a greater degree of likelihood that bidders using such control clause would be quoting prices which would produce total costs to the Government at destination as low as those quoted by any competitor. The Commission should have further found that the use of this control clause was not by agreement or collusion but was made by various companies in their effort to quote as low as any competitor for the reason that the Government would not buy cement from any seller whose bid

resulted in total costs to the Government at destination higher than some other bidder. The Commission should have pointed out that the Government, even when it calls for f.o.b. mill bids, does not award a contract to the lowest f.o.b. mill bidder but awards a contract to that bidder whose f.o.b. mill quotation, plus transportation costs from such mill to the destination where the cement is to be used, makes the lowest total cost. (R. 28049, 32672-74, 32676-720, 36299, 36734-35, 36797-98) In many instances the lowest total cost at destination is thus made by a mill not quoting the lowest f.o.b. mill price.

The Commission should have further found that this practice of the Government purchasing agencies in giving the award to the seller submitting a bid producing the lowest total cost at destination resulted in all cement sellers endeavoring to anticipate and meet such lowest total cost at destination, frequently resulting in quoting of prices producing identical total cost at destination. The evidence does not support the Finding of the Commission that the Code Authority promoted and furthered the use of the control clause in bids made to the Government. The Commission should have found that the Code Authority merely explained the meaning of the control clause where inquiry was made regarding its meaning by members of the industry. The Commission's Findings in Paragraph Eight (k) are further inadequate and incomplete to explain fully the control clause often used in bidding to the Government where land grant rates are involved and detailed explanation thereof will be made by Universal in its brief.

The Commission should have further found that bids made with the use of the control clause were, in fact, bids f.o.b. mill and were used where the Government requested f.o.b. mill bids and where land grant rates or other special rates were available to the Government. The control clause was a clause defining to the Government the way in which it could determine the exact f.o.b. mill price of the bidder. (See Part A, Paragraphs 58-119)

31. Paragraph Eight (1) of the Commission's Findings to the effect that before the development of the use of the control clause, bids involving land grant rates implied cooperation among cement companies which in some instances amounted to agreements on bids to be made, is misleading in failing to point out that Universal is not shown by the evidence to have been involved in any bids with respect to

which it had made an agreement with any other cement company. The Finding is incomplete in failing to point out which cement companies the Commission found had entered into such alleged agreement.

32. Paragraph Eight (m), (n) and (o) of the Commission's Findings is incomplete in that the Commission should have also found that the collection and dissemination by The Cement Institute and by the Pacific Coast Institute to its members of land grant freight rates available to the Government were not illegal.

33. Paragraph Nine (b) of the Commission's Findings is misleading in that it cites a number of examples where various cement companies made identical bids and creates therefrom an inference of collusion to reach that identity, and in failing to find that witnesses from various cement companies have explained in the record the reason for such identity, showing an absence of collusion or agreement. Said paragraph is also misleading in that it picks out examples of identical bidding in which Universal was one of the bidders but if confines the examples to those as to which the Trial Examiner of the Commission refused to allow Universal to produce testimony in explanation of the way in which Universal arrived at its bid which testimony, if produced, would have shown that Universal arrived at its bid without collusion or agreement with anyone. (See Part A, Paragraph 120)

Said paragraph is further misleading in that it fails to state that with respect to other bids in the record as to which Universal was one of the companies quoting identical bids, Universal was permitted to produce testimony and proved that in all such bids, as to which it was permitted to make explanation, Universal arrived at its bid without collusion or even contact with any competitor, although such bids were frequently identical with bids submitted by other cement companies, and that such identity was the result of the efforts of Universal to quote as low as the lowest of all bidders. (See Part A, Paragraphs 58-119) Said paragraph is further misleading in that it creates an inference of collusion or agreement by pointing out that in some instances identical bids submitted by competitors ran out into fractions of a cent per barrel (sometimes the bid running into many decimal places), but in failing to point out that such bids were always bids to the United States Government where land grant freight

rates were involved and that such bids were the result of the use by the bidders of the actual freight rates available to the Government, which freight rates ran out to numerous decimal places when quoted in freight rate per barrel of cement. For example, if Universal has a base price of $1.70 per barrel at one of its mills and if the land grant freight rate available to the Government from such mill to a particular destination is 30.1234567 cents per barrel, Universal would customarily quote the Government a destination cost made up of the sum of those two factors unless Universal believed that some competitor would quote lower. Thus a destination cost quotation in such hypothetical illustration would be $1.70 plus 30.1234567 cents, or $2.1234567 per barrel. Quotations are made in this way where land grant rates are involved to give the Government the full benefit of land grant rates. (See Part A, Paragraph 54)

34. Paragraph Nine (c) of the Commission's Findings is incomplete and misleading in failing to point out that the uniform bids by various cement companies at the various destinations mentioned in said paragraph were at the current commercially established and known destination price in each of said destinations, and that each and every cement company, including Universal, was able to bid such current commercial price at each of said destinations without collusion or agreement with the other companies. The Commission should have further found that the few bids referred to in said Paragraph Nine (c) which were higher than bids generally submitted were higher because the particular cement company making such higher bid did not wish to submit a bid which might be accepted and called for shipment of cement to certain particular destinations because such shipments would have involved higher freight rate expenses to such high bidders than they were willing to absorb. The Commission should have further found that state highway commissions have required any bidder submitting any bids to bid at all destinations in the state to which the state calls for bids and that for this reason those few cement companies mentioned in said paragraph who bid higher at certain destinations were compelled to bid at the destinations to which they did not wish to make shipments in order that they would be permitted to bid at other destinations as to which they would welcome an order for cement.

34. Paragraph Nine (c) of the Commission's Findings is incomplete in stating that "there has been no systematic exchange among the corporate respondents [cement companies] of basing point prices or changes in such prices." The Commission should have found that such changes in basing point prices as have occurred have been made individually by various cement companies from time to time without collusion or agreement (see Part A, Paragraphs 25-31, 36), and the Commission should have further found that the frequent uniformity of destination prices quoted by various cement companies based on such "basing point prices" was not the result of collusion or agreement but was the result of various cement companies endeavoring to quote a price as low as the lowest in order that they might have an opportunity to sell cement, which they could not do otherwise because of the fact that buyers will not pay more in total cost at destination for one brand of cement than for another brand. The Commission should have further found that there is no illegality in meeting the price of a competitor unless it is done because of some agreement.

35. Paragraph Ten (a) of the Commission's Findings is incomplete and misleading in stating that a price base established at the mill of another producer is "punitive." The paragraph creates an erroneous inference that such price base is established by the competitor to compel adherence to a system of pricing. The Commission should have found that the evidence shows that price bases have at times been established by certain individual cement companies at mill locations of other cement companies but only when the owner of the mill where the involuntary base was established has been systematically selling cement at prices which did not reflect the announced price base at his mill. The Commission should have further found that competitors who have established such involuntary price bases at mills owned by other cement companies did so in order to establish a method of pricing for their own quotations which would produce destination prices as low as those being quoted by the owner of the mill at which the involuntary price base was established. The Commission should have found that this is a method merely of meeting prices actually in effect where such prices actually in effect do not truly reflect a published or announced price base at a mill.

The Commission should have further found that Universal has never placed an involuntary price base upon the mill of any other cement company. (See Part A, Paragraph 121)

36. Paragraph Ten (b) of the Commission's Findings is incomplete in that the Commission should have pointed out that the so called involuntary base referred to in said paragraph established by Lehigh at Rapid City, South Dakota, was an example of Lehigh using a price base which would, in fact, produce prices as low as the South Dakota mill at Rapid City was actually quoting. This was an example as shown by Paragraph Ten (b) of the Commission's Findings where the South Dakota mill had an announced or published price base but was regularly failing to use such price base in making its price, but instead was quoting lower prices and by reason thereof Lehigh and other competitors were unable to sell cement unless they established prices at least as low as those being quoted by the South Dakota mill. Thus, the establishment by Lehigh of the so called involuntary base was merely a means of competing with the prices the South Dakota mill was actually quoting.

The Commission should have further found that when a cement company established a so called involuntary price base at the mill of some competitor, the company establishing such price base thereupon quoted destination prices to various destinations in the vicinity of such mill by adding to such price base the freight from the mill where the price base was in effect to those destinations, and that it made its prices in this way so that they would be perfectly fair and non-discriminatory as among its various customers, and nevertheless be at a price level which would be as low as the secret prices which the owner of the mill where the involuntary base was established had actually been quoting in such vicinity.

37. Paragraph Ten (i) of the Commission's Findings is incomplete and misleading in that it unjustly creates an inference of collusion between the management of the Aetna Portland Cement Company and certain other cement companies. The Commission should have pointed out that the evidence shows without contradiction that the Aetna Company had been losing money in large amounts for about five years prior to 1936 (R. 986-87, 989-90, 1033-34, 1069-70) and that the conference in October, 1933,

referred to in said paragraph of the Findings was the result of Mr. F. R. Johnson, President of the Aetna Company, calling upon executives of other cement companies, in whom he had confidence, to talk with him about the condition of his own company. The Commission should have pointed out that Mr. Johnson, although President of the Aetna Company, had not theretofore actively headed the company but had been engaged in another business in Boston, Massachusetts, and was unfamiliar with the actual running of the company (R. 980, 1015, 1043, 1054-5); that he called upon other cement executives, in whom he had confidence, to go over with him and discuss with him the practices in which his company had engaged in Michigan in order to attempt to stop the piling up of large financial losses. (R. 1017, 1078-9, 996, 1005, 1008, 1030, 1059-60)

The Commission should have further found that Mr. Johnson, after discussions with other cement men, established new policies for his company which his sales manager, Harold Cree, refused to follow and which, therefore, resulted in the discharge of said sales manager. The Commission should have found that the testimony shows that Mr. Johnson made his own decisions after discussing the cement business with various people in whom he had confidence who knew something about the business and that his decisions were not the result of any collusion or agreement but were his individual decisions and actions. (R. 34402-05, 34499-500)

38. Paragraph Eleven (b) and (c) of the Commission's Findings is incomplete. The Commission should have found that the evidence shows that Universal never agreed with any other cement company what Universal would do regarding the trucking problem. The Commission should have found that the evidence shows that building material dealers who are buyers of cement were strongly opposed to the practice of mills allowing cement dealers to call at the mills with their own trucks for cement. (See Part A, Paragraphs 155, 162, 193-95, 199, 200) The Commission should have found that Universal stopped the practice of customer trucking at some of its mills because of this general dislike of such practice by its dealers, who constitute the largest class of customers of Universal.

Paragraph Eleven (b) and (c) is further incomplete in that it fails to state the reasons shown in the evidence for Universal's dislike of such trucking practices, one of the

most important of which is that where trucking was done, competitors shipping in carloads to such destinations soon found it necessary to acquire expensive warehouses in order to compete, all of which will be explained more fully in Universal's brief. (See Part A, Paragraphs 149-54)

39. Paragraph Eleven (e) and (f) of the Commission's Findings creates an erroneous inference in that it fails to point out that the meeting of cement manufacturers in Chicago on November 17, 18 and 19, 1931, referred to in Paragraph Eleven (f) of the Findings, was a meeting of the Portland Cement Association and was not a meeting for the discussion of trucking problems at all. The Commission should have further pointed out that the statements of certain parties quoted in said Paragraph Eleven (e) and (f) are hearsay; that the parties who made such statements were not called to the witness stand for proof of such statements; that these hearsay statements were admitted in evidence over objection and that the cement companies had no opportunity to cross examine the makers of such hearsay statements and should have found that such statements from which inferences of collusion or agreement arise with respect to the trucking problem, should be disregarded as not constituting substantial evidence thereof.

The Commission should have further found that the evidence shows clearly that the question of delivering cement to dealers calling at the mills with their own trucks was a very acute question in 1931 and 1932; that cement dealers generally were strongly opposed to the practice and numerous dealers had written various cement manufacturers asking them to stop the practice; that many cement manufacturers themselves were opposed to the practice because of chaotic results which were produced by it, but that there is no evidence of any agreement or collusive action among the cement manufacturers, and particularly that there is no evidence of any collusion or agreement by Universal with any other cement company as to the action to be taken with respect to the problem of trucking. (R. 7276, 23689-90, 26852-3, 28135-38, 35674-77)

The Commission should have further found that Universal discontinued trucking at certain of its mills by its own individual determination after it found that other competitors had discontinued the practice of delivering cement to dealers in their trucks at the mill. (See Part A,

Paragraphs 161, 196) The Commission should have further found that the attitude of Universal with respect to the trucking problem has been that it will follow the desire of its dealers, and that with respect to certain mills where dealers desire trucking, Universal continues the practice. For example, dealers may call for cement in trucks at Universal's Duluth plant, where the cement is then sold at the price base in effect at said plant. Trucking is done into certain parts of Illinois from the Buffington, Indiana, plant and trucking occurs from various warehouses which Universal has at certain Great Lakes ports, such for example as Milwaukee and Green Bay, Wisconsin, and Muskegon, Michigan. (See Part A, Paragraphs 147-201)

40. Paragraph Twelve (a) of the Commission's Findings is incomplete and misleading in that it does not explain clearly what a diversion in transit is and what the effect thereof is upon competition. A full explanation of diversions will be made by Universal in its brief. This paragraph of the Findings is not supported by the evidence in so far as it states that cement companies undertook, by means of understandings and agreements, to prevent purchasers making diversions in transit. The Commission should have found that cement companies generally are opposed to permitting diversions and took individual action to prevent them. (R. 23332, 26442, 32408, 30627, 39706-7)

41. Paragraph Twelve (c) of the Commission's Findings is incomplete in that it creates an inference that the recently adopted practice of cement companies prepaying freight charges on all shipments of cement was the result of collusion and agreement. The Commission should have found that the evidence shows that one cement company began prepaying freight charges; that this was an advantage to buyers of cement because when freight was prepaid by the manufacturer, the buyer did not have to pay the freight to the railroad at the time of the delivery of the cement but could wait until paying the cement invoice.

The Commission should have further found that this advantage to buyers compelled all other manufacturers to adopt a similar practice in order to keep their customers. (R. 29863, 39039, 39538-40)

42. Paragraph Thirteen (a) through (g) of the Com-

mission's Findings is incomplete in that it fails to point out that contract checking and cancellation of duplicate contracts carried on in the same way as that referred to in said Paragraph Thirteen (a) through (g) was the subject of litigation in the case of *Cement Manufacturers' Protective Association* v. *United States*, 268 U. S. 588, and the practice of cooperative contract checking was found to be proper. The paragraph is further incomplete in failing to point out that the checking of contracts by The Cement Institute for the discovery of fictitious duplication of contracts is shown by the evidence to have been discontinued in 1936. (R. 4194-98)

43. Paragraph Fourteen (a) and (b) of the Commission's Findings is incomplete and misleading and the evidence does not support the Finding that the uniformity of terms and conditions of sale frequently found in the industry were brought about by collective action. The Commission infers, by the use of the words "collective action," illegal agreement and any such inference is not sustained by the evidence. The Commission should have further found in Paragraph Fourteen (b) that the various activities of the Association of American Portland Cement Manufacturers referred to were recommendations only and were not agreements. The minutes from these ancient meetings of the Association of American Portland Cement Manufacturers were improperly admitted into evidence over objection of cement companies, are too remote to prove any of the allegations of the complaint or to show that the cement companies are in violation of the Federal Trade Commission or the Clayton Acts, and do not constitute substantial evidence to show any such violations. There is no evidence to show that Universal became a party to any of the alleged agreements referred to in said Paragraph Fourteen (b) of the Commission's Findings.

44. Paragraph Fourteen (d) of the Commission's Findings is incomplete and misleading in that it fails to point out that Universal and many other cement companies were not members of The Cement Institute until 1933 and were not members at any time during which The Cement Institute Code of Ethics was in effect, and in failing to point out that said Code of Ethics was abolished by action of The Cement Institute in 1933, at the time Universal and

numerous other cement companies became members of The Cement Institute. (See Part A, Paragraphs 230-31)

45. Paragraph Fourteen (e) of the Commission's Findings is incomplete in that it fails to point out that the evidence shows that Universal, independently and without consultation or agreement with any competitors, initiated its own sales policies in January, 1931, and March, 1931 (Resp. Exhs. 2478, 2479), discontinuing dealer discounts, and that other cement companies later followed this practice begun by Universal without any agreement with Universal but solely by individual determination. (See Part A, Paragraphs 139-40)

46. Paragraph Fourteen (g) of the Commission's Findings is incomplete and misleading in that it creates an inference that the "Compendium" referred to in said paragraph was an agreement among cement companies, whereas the evidence, on the contrary, is uncontradicted to the effect that the "Compendium" was merely a statement of what were considered to be the best marketing practices and was not an agreement or binding or obligatory upon any cement company. (See Part A, Paragraphs 233-34)

47. Paragraph Fifteen (d) of the Commission's Findings is incomplete in failing to point out that Universal and various other cement companies were not members of The Cement Institute and did not participate in its activities during the years 1929 and 1930 referred to in said paragraph. (See Part A, Paragraphs 230-31)

48. Paragraph Fifteen (f) of the Commission's Findings is misleading in that it creates an inference that because individual cement manufacturers realized the harmful effects of overproduction during the period in question, such action as was taken must necessarily have been the result of collusion and agreement. The evidence does not sustain any such inference and the Commission should have pointed out that there is no evidence that individual cement companies restricted their production through any agreement or understanding or because of any other reason than individual determination and action based on such individual determination.

49. Paragraph Fifteen (i) of the Commission's Findings is incomplete in failing to point out that there is no evidence in the record to show that the statistical data

collected and disseminated by The Cement Institute to members was used in any improper and illegal manner and in failing to point out that the collection and distribution of such information is not illegal *per se.* (See *Salt Producers Assn.* v. *Fed. Trade Comm.*, 134 F. 2d 354, 359; *Sugar Institute* v. *U. S.*, 797 U. S. 553, 601-4)

50. Paragraph Fifteen (j) of the Commission's Findings that the statistical service of the Institute resulted in substantial restraint upon price, production and sales policy of the cement companies is not supported by the evidence.

51. Paragraph Sixteen of the Commission's Findings is entirely irrelevant to the issues in this case and discloses no illegal action.

52. Paragraph Seventeen (a) of the Commission's Findings to the effect that cement companies, through agreements and understandings among themselves and with groups of dealers and dealer organizations, secured uniformity in their dealer policies, is unsupported by the evidence. The Commission should have found that dealer policies of various cement companies tend to become uniform because of the fact that buyers will not buy from any manufacturer who sells under a less favorable sales policy from the dealer's standpoint than some other manufacturer. (See Part A, Paragraph 3) The Commission should have further found that the record shows that at times when some cement company was selling at less favorable terms from the dealer's standpoint than others, that company lost business and had to modify its sales policy to be as favorable as that of other manufacturers before regaining its lost business. For example, see FTC Exh. 193 where nine companies bid identical prices but the award was given to one bidder who agreed to pay freight on the return of empty sacks.

The Commission should have further pointed out that dealers buy more cement than any other class of customers (see Part A, Paragraphs 131-32) and that the desires of dealers have a great influence on manufacturers, and that the tendency of sales policies to become alike has been due to the individual action of cement companies in meeting dealer desires rather than to any collusion and agreement. The Commission should have further found that it would be unusual and strange to expect divers and different

dealer policies in an industry selling the same product, to-wit, standard cement, which is so much alike from the buyer's standpoint that buyers will not pay even one penny a barrel more for one brand than for another, and that in these circumstances uniformity in dealer policies should not create an inference of collusion and agreement.

The Commission should have further pointed out that witnesses for Universal described its dealer policies and testified that each one of them adopted and promulgated from time to time was the result of individual determination by Universal without agreement with any other cement company. (See Part A, Paragraphs 136-42)

53. Paragraph Seventeen (d) and (e) of the Commission's Findings is incomplete in failing to point out that the evidence shows that Universal put out a sales policy (Resp. Exh. 2480) under date of February 21, 1935, after having first learned from its salesmen in the field that a competitor had shortly before put out a similar sales policy. The testimony shows that Universal put out its sales policy so that it might have a policy as favorable as that already issued by its competitor. The testimony further shows that on April 9, 1935, Universal put out a modified sales policy (Resp. Exh. 2481) after having discovered from its sales representatives in the field that a competitor had a few days before issued a more favorable sales policy to dealers than that which had been issued in February, 1935. Testimony shows that Universal put out its sales policies without agreement with its competitors but issued policies substantially similar to those it found had already been issued by competitors because it knew that to keep its customers it would have to issue a sales policy as favorable as that of other competing manufacturers. (See Part A, Paragraphs 136-42)

Paragraph Seventeen (e) is further incomplete and misleading in that it creates an inference that members of the Sixth District of The Cement Institute in July, 1935, entered into an agreement with respect to methods of marketing cement, whereas the Commission should have found, as the uncontradicted evidence shows, that a document called "Method of Marketing Cement" was prepared by a clerk of Universal as a detailed interpretation of Universal's sales policy of April 9, 1935; that this Method of Marketing was not obligatory on any cement company

but was a statement in detail of the method of selling set forth in Universal's sales policy of April 9, 1935, and necessarily, therefore, likewise amounted to a detailed statement of a method of selling in sales policies issued by other companies who had followed and copied the form of policy issued by Universal. Some companies who had individually adopted Universal's sales policy without obligation or agreement, but solely because they wanted to do so, asked for and were given copies of the detailed Method of Marketing, but without any obligation on the part of any company to follow it. The evidence shows that this Method of Marketing would have been followed by any salesman properly interpreting Universal's April 9, 1935, sales policy and was prepared for the benefit of new salesmen or other personnel of Universal unfamiliar with the meaning of the sales policy. (R. 13132, 13174-76, 13181, 35363-404)

The Commission should have further pointed out that these sales policies and the Method of Marketing do not relate in any way to the method of selling cement which the Commission calls the "multiple basing point system," but relate only to a determination of what class of customers will be sold direct by cement manufacturers and what other classes will be sold only through the medium of dealers.

55. Paragraph Seventeen (f) of the Commission's Findings is misleading in that it creates an inference that all cement companies, including Universal, agreed upon their dealer policies and took steps to maintain uniform compliance with such policies. Such inference is not supported by the evidence. On the contrary, testimony of Universal witnesses, which is not contradicted in the record, is to the effect that Universal's sales policies were adopted independently by it without agreement with any of its competitors and that it never agreed with anyone to comply with its policies but was free to change them at any time. (See Part A, Paragraphs 139-42)

56. Paragraph Eighteen of the Commission's Findings stating or inferring agreed action by Universal and other cement manufacturers is not supported by the evidence. (See Part A, Paragraphs 136-42)

57. Paragraph Nineteen (a) and (b) of the Commission's Findings is incompetent to prove any collusion or

agreement existing among cement companies generally and, in view of the fact that all efforts to boycott dealers handling foreign cement ceased about 1934, the matters referred to in Paragraph Nineteen (a) and (b) should not be considered to prove any of the allegations of the Complaint.

The Commission further should have pointed out that these efforts to discourage dealers from handling foreign cement were participated in by only a few cement companies and did not relate to the method of selling cement which is commonly known as the basing point method.

58. Paragraph Nineteen (c) of the Commission's Findings is incomplete and misleading in that it fails to point out that after the invalidation of the NRA in 1935, high administrative officials of the Federal Government called upon industry to continue their practices as under the NRA Codes until the legal situation should be clarified (FTC Exh. 590 A-B), and said paragraph is further incomplete in failing to point out that the filing of prices with the Trade Practice Committee of the Institute was continued only until the end of the year 1935, and then ceased and has never been resumed. (R. 2823, 3694-96, 3712) The Commission should have further found that there is no evidence that prices filed with the Trade Practice Committee were considered obligatory upon any cement company (R. 2824-5, 17004-5, 17065-70, 23941, 35926-7, 39674-75) and that, in the absence of agreement or obligation, the dissemination by a respondent of its current price lists is not illegal. (See *Salt Producers Assn.* v. *Fed. Trade Comm.*, 134 F. 2d 354, 359; *Sugar Institute* v. *U. S.*, 297 U. S. 553, 601-4)

59. Paragraph Twenty (a) and (b) of the Commission's Findings is unsupported by the evidence in so far as it finds that standard specifications for Portland cement were adopted by cement companies. The Commission should have found that for many years the American Society of Testing Materials and various Government agencies have maintained committees designed to improve the quality of various commodities, including cement, and that for many years minimum standard specifications adopted by those bodies have been met by all cement manufacturers, and that this was the result of customer and governmental demand and was not collusive or in restraint of trade in any way. The Commission should also have pointed out

that minimum specifications for high early-strength cement which it found were adopted in 1930 were not adopted by cement companies but were adopted by a committee of the American Society of Testing Materials. (R, 48447; Resp. Exh. 411)

The Commission should also have pointed out that despite the differences in standard cement, the evidence is uncontradicted that customers, including Government purchasing agencies, will not pay more for one brand of standard cement than for another, and that buyers insist only that the cement of a manufacturer meet the minimum specifications adopted by the American Society of Testing Materials.

Paragraph Twenty (a) and (b) of the Commission's Findings is misleading in that it erroneously attempts to infer an agreement among cement companies to make cement according to certain specifications for the purpose of enabling the companies to maintain uniform prices. Such an inference is entirely unsupported by the evidence.

60. Paragraph Twenty (h) of the Commission's Findings is incomplete and misleading in that it fails to point out that numerous purchasing agents of the Federal and State Governments testified in this case that they knew of the difference in quality among brands of cement, but that nevertheless they would not pay even as much as one penny a barrel more for one brand of cement than for another. The Commission should have found that despite differences in quality of cement, so long as the cement of various manufacturers meets minimum specifications of the American Society of Testing Materials, buyers who are informed of the differences in cement, as well as buyers who are not so informed, will not pay more for one brand than for another. (See Part A, Paragraphs 1-5)

61. Paragraph Twenty-one of the Commission's Findings is entirely incompetent to prove any charges of collusion or agreement and is merely a statement of individual opinions as to efforts that should be made by the industry to acquaint the public with the industry, and is not a proper basis for the Cease and Desist Order issued in this case.

62. Paragraph Twenty-two of the Commission's Findings is misleading in that it creates an inference that experts testified to the practices of the cement companies, whereas the evidence shows that the experts were uni-

versity professors who testified solely with respect to hypothetical questions and economic principles. Such evidence is not proper to prove either a presence or absence of collusion in the activities of the companies in the business of selling their cement and any testimony of such economists that collusion existed in the cement industry should be disregarded and any inference to that effect from such testimony is improper (*U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, 448)

63. Paragraph Twenty-three (a) and (b) of the Commission's Findings is not supported by the evidence in so far as it states that the multiple basing point delivered price method of selling is a discriminatory method of pricing. The paragraph is very incomplete and misleading in failing to point out that cement can only be sold at the lowest quoted price and that in "matching prices," as the Commission phrases it, competitive companies are merly meeting the lowest price quoted by a competitor and do this for the purpose of selling cement. The Commission should also have pointed out that the Robinson-Patman Act recognizes the right of a seller to name a lower price if necessary to meet competition. The Commission should also have pointed out that when the evidence shows clearly, as it does in this case, that cement will not sell except at the lowest quoted price, a large degree of identity or uniformity in prices from various competing companies should be expected without any suggestion of the same being the result of collusion or agreement.

The Commission should also have pointed out that any sales made by Universal are made up of its price base at its selling mill plus freight to the destination in question and that the delivered prices on such sales differ only in an amount corresponding to the actual differences in the amount of freight except at destinations where Universal is unable to get a price as high as that made by adding freight to its price base, in which event Universal customarily quotes a lower destination price at such destinations to meet the lower price of its competitor or, in some instances, fails to quote at all and withdraws from any effort to sell at such destination. (See Part A, Paragraphs 6-8)

64. Paragraph Twenty-three (c) of the Commission's Findings is incomplete and misleading in that it fails to

define "cross-hauling" in an accurate or understandable way and it fails to point out that there can be no competition if cross-hauling is not permitted. (See Part A, Paragraphs 123-30) Universal will explain the subject of cross-hauling in its brief. The evidence does not sustain the Finding in this paragraph that each company waives advantages in its natural territory in return for a reciprocal waiver by other companies. The paragraph is further immaterial and incompetent in that it fails to state any violation of law and does not tend to prove the allegations of the complaint.

65. Paragraph Twenty-four (b) of the Commission's Findings is not sustained by the evidence. The Findings in this paragraph are insufficient in law to constitute proper Findings as they are not based upon proper Findings of basic facts. The Findings in Paragraph Twenty-four (b) in effect amount to nothing but a conclusion by the Commission that Count II of the complaint has been proved. Such a Finding is not sufficient to sustain a Cease and Desist Order.

66. Paragraph Twenty-four (c) of the Commission's Findings to the effect that "mill nets" are recognized by cement companies as true prices is not supported by the evidence. The paragraph is further misleading and incomplete in failing to point out that cement sales are generally made f.o.b. destination at a delivered price which includes as one of the items making it up, the freight from the mill to destination. The paragraph is also incomplete in failing to point out that Universal sales contracts introduced into evidence provide that the buyer of cement should pay the freight on the shipment to the railroad for the account of Universal. The paragraph is also incorrect in failing to point out that Universal recognized its responsibility for risk of loss and damage in transit where the cement was shipped f.o.b. destination. (See paragraph entitled "Claims" in various Universal sales forms, Resp. Exh. 2525 B, D, F, H, J, L) The evidence fails to support the Finding that the cement companies, and particularly Universal, by concert of action, sought to avoid the responsibility for risk of loss and damage of shipment in transit. The Commission should have pointed out that there is no law which requires cement companies to sell only f.o.b. mill and that there is no law which requires cement com-

panies, for the purpose of the discrimination statutes embodied in the Clayton Act, to regard "mill net" as true price.

67. Paragraph Twenty-four (d) of the Commission's Findings is argumentative and not a true Finding of any facts. It seems to be based on the premise that if any cement manufacturer is able to anticipate the price of his competitors, it will be illegal for him to meet those prices and that the law requires him to name some different or other price. Since the evidence is clear that a cement manufacturer cannot sell any cement if he quotes a higher price than is being quoted by others, the Commission should have pointed out that there can be no inference of illegality when one competitor makes a price at least as low as another competitor. The Commission fails to point to any law that requires a competitor to make a lower price than he finds being quoted by others and it is clear from the evidence that if he does so repeatedly, his competitors will be unable to sell cement and will be forced to reduce their prices, thus starting a downward spiral which has frequently resulted in price wars, leading to disastrous results for the entire industry.' (R. 34843-47, 34927)

68. Paragraph Twenty-four (e) of the Commission's Findings is not supported by the evidence. It consists in large part of conclusions of law, which are erroneous, and it is argumentative and does not tend to support the allegations of the complaint.

69. Paragraph Twenty-five of the Commission's Findings is a legal conclusion only and is not supported by the evidence or by the Findings of the Commission.

70. Paragraph Twenty-six of the Commission's Findings is a conclusion not supported by the evidence and not supported by the Findings of the Commission.

71. The Cease and Desist Order issued by the Commission on the 17th day of July, 1943, is contrary to law, contrary to the evidence, not supported by the Findings, deprives Universal and other cement companies of rights guaranteed to them under the Federal Constitution, and particularly the Fifth Amendment thereof, freely to carry on their business in such a way as they desire so long as they do so without violating any law.

72. The Cease and Desist Order issued by the Commis-

sion is unlawful and exceeds the jurisdiction of the Commission in that:

(a) There is no evidence that petitioner's methods of sale are or have been unfair and injurious to any competitor, class of competitors or class of persons competing with petitioner.

(b) There is no evidence that petitioner's methods of sales are, have been, or threaten to be detrimental or injurious to or against the interests of the public.

Respectfully submitted,

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In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

* * (Caption 8402) * *

Statement of Points Upon Which Petitioner Intends to Rely.

(U.S.C.C.A.-7. Filed Mar. 17, 1944. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your Petitioner California Portland Cement Company having filed with this Court its petition to review and set aside an Order to Cease and Desist of Federal Trade Commission made and entered on July 17, 1943, now makes and files this Statement of Points upon which it intends to rely and this assignment of errors which it intends to urge and rely upon in support of its petition.

I.

The Commission erred in making and entering its order to cease and desist as follows:

1. The order is unlawful and exceeds the jurisdiction of the Commission in that the acts prohibited do not constitute unfair methods of competition within the meaning of the statute.

2. The order is unlawful and exceeds the jurisdiction of the Commission in that the acts prohibited do not constitute a contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Antitrust laws.

3. The order is unlawful and exceeds the jurisdiction of the Commission in that the entering into, continuing, or carrying out of a "planned common course of action" to do the things listed in the order, to the extent that the quoted language has any meaning different from the language "contract, combination or conspiracy" to do such things, does not constitute an unfair method of competition within the meaning of the statute, or a contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Antitrust laws.

4. The order is unlawful and exceeds the jurisdiction of the Commission in that there is no evidence that Petitioner entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination or conspiracy to do any of the things prohibited in paragraphs 1 through 4 of the order, or that it did any act to carry out or perform any such course of action, understanding, agreement, combination or conspiracy.

5. The order is unlawful and exceeds the jurisdiction of the Commission in that it requires Petitioner to cease and desist from methods of competition and acts and practices which are not charged in the complaint, among which are the following:

(a) Entering into, continuing, or carrying out any "planned common course of action" to do the things listed in the order to the extent that the quoted language has any meaning different from contract, combination or conspiracy.

(b) Entering into, continuing or carrying out any contract, combination or conspiracy "between and among any two or more (a number less than "Respondents" generally) of said Respondents, or between any one or more of them and others not parties to this proceeding, to do or perform the things listed in the order.

(c) Quoting or selling cement at prices calculated or determined pursuant to or in accordance with any plan or system other than the plan or system described in the complaint which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by Petitioner and any other respondent.

(d) Quoting or selling cement at prices calculated or determined pursuant to or in accordance with any plan or system other than the one described in the complaint which prevents purchasers from finding any advantage in price in dealing with any one or more of the respondents against any of the other respondents.

(e) In connection with the alleged methods, acts or practices referred to in (c) and (d) above, doing any of the things listed in paragraph 2 of the order.

(f) Refusing or declining when quoting or selling cement at a price effective at the location of its mill, to allow purchasers to provide transportation by any means that they may desire.

(g) Collecting, compiling and circulating or exchanging statistical data which reveals the individual production, stock, sales or shipment of cement of one or more respondents to other respondents.

(h) Using any means substantially similar to those specifically set out in the order with the purpose or effect of accomplishing any of the things prohibited by the order.

6. The order is unlawful and exceeds the jurisdiction of the Commission in that it is so vague and indefinite as not to provide a standard of conduct by which Petitioner can be guided in carrying on its affairs, particular reference being made to sections (d), (g), (h), (l) and (p) of paragraph 2, and to paragraph 4, of the order.

7. Paragraph 2(n) of the order is unlawful and exceeds the jurisdiction of the Commission in that it prohibits actions which have been held proper.

8. The order is unlawful and exceeds the jurisdiction of the Commission in paragraph 3 of the order in that there is no finding that Petitioner either in combination with others or otherwise, discriminated in price in the course of interstate commerce between or among its respective customers.

9. The order is unlawful and exceeds the jurisdiction of the Commission in paragraph 3 in that there is no finding with respect to Petitioner's interstate commerce that any discrimination in prices between different purchasers had any effect substantially to lessen competition between Petitioner and its competitors or between customers or buyers of cement, or to tend to create a monopoly, or to tend to injure, destroy or prevent competition between any persons in any territory in which Petitioner carries on interstate commerce.

10. The order is unlawful and exceeds the jurisdiction of the Commission in paragraph 3 in that there is no finding that any differentials in prices made by Petitioner in its interstate commerce made differences other than due allowance for differences in costs of sale or delivery resulting from differing methods or quantities or other than differences made in response to changing conditions or to meet equally low prices of a competitor.

11. The order is unlawful and exceeds the jurisdiction of the Commission in paragraph 3 in that the Commission unlawfully delegated to the Trial Examiner the power to hold hearings and take evidence with respect to the alleged violations of the Clayton Act.

12. The order is unlawful and exceeds the jurisdiction of the Commission in paragraph 3 in that it is not supported by the Findings as to the Facts of the Commission.

II.

The Commission erred in making its Findings as to the Facts and its Conclusion as follows:

1. The Findings as to the Facts are improper in form and substance and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of Findings as to the Facts provided for by law and upon which any order of the Commission may be based. For illustration, the following particulars are pointed out:

(a) There is no specific finding as to Petitioner that it entered into or become a party to any contract, combination or conspiracy in restraint of interstate trade or commerce, or as to who were the parties to such contract, combination or conspiracy, or as to what was the date of inception or the subject-matter of the supposed contract, combination or conspiracy.

(b) There is no specific finding that Petitioner did any act or made any declaration which will support a finding that Petitioner was a party to any contract, combination or conspiracy with "Respondents" generally or with any other respondent to do any of the things alleged in the complaint.

(c) There is no specific finding as to Petitioner that it authorized, or was a party to, acts or declarations found to have been committed or made generally by "Respondents" which the Commission relies upon to support its implied finding of the existence of a contract, combination or conspiracy among "Respondents."

(d) There is no specific finding that Petitioner did any acts or made any declarations in furtherance of, or to carry out any contract, combination or conspiracy among "Respondents."

(e) There is no specific finding as to Petitioner that it authorized, or was a party to, acts or declarations found to have been committed or made by "Respondents" generally which the Commission relies upon to support its finding that "Respondents" committed acts in furtherance of and to carry out a contract, combination or conspiracy in restraint of interstate trade or commerce.

(f) There is no specific finding that any of the acts or declarations found to have been done or made by "Respondents" generally, or by certain respondents, were done or made in furtherance of or to carry out any contract, combination or conspiracy to which Petitioner is found to have been a party.

(g) The Findings are vague, ambiguous and misleading in finding that declarations were made and acts were committed by "Respondents," "a number of Respondents," "some Respondents" generally, without finding that Petitioner was or was not a party to the acts or declarations or did or did not authorize the same or that the acts or declarations were or were not done or made in furtherance or performance of a contract or combination to which Petitioner was a party.

2. The Findings as to the Facts are improper in form and substance in that in so far as they are made against Petitioner they are not relevant, competent or material on the issue that Petitioner used unfair methods of competition in its interstate commerce, particularly:

(a) The Findings that alleged co-conspirators did acts and made declarations without any finding that Petitioner was a party to or authorized the acts or declarations is not material, relevant or competent to prove, or as a finding, that Petitioner was a party to a contract, combination or conspiracy in restraint of interstate trade or commerce or to hinder, lessen, restrict or restrain competition in price in interstate commerce or to do the things charged in the complaint.

(b) The Finding that alleged co-conspirators did acts and made declarations with respect to interstate commerce wholly separate and distinct from the interstate commerce of Petitioner and the interstate commerce in Petitioner's market territory is not material, relevant or competent on the issue of the existence of a contract, combination or conspiracy with respect to the interstate commerce of Petitioner or in Petitioner's market territory.

(c) The Finding that alleged co-conspirators did acts and made declarations in furtherance of or to carry out a contract, combination or conspiracy with respect to interstate commerce without a finding of the terms and extent of the conspiracy and without a finding that Petitioner was a party to the particular conspiracy is not material, relevant or competent against Petitioner.

(d) The Finding that alleged co-conspirators did acts and made declarations with respect to their interstate commerce wholly separate and distinct from interstate commerce of Petitioner and interstate commerce in Petitioner's market territory is not material, competent or relevant on the issue of the use of unfair methods of competition in Petitioner's interstate commerce.

(e) The Findings against Petitioner relating to acts committed by Respondents other than Petitioner long prior to any date on which even the Commission claims that Petitioner was a party to any contract, combination or conspiracy alleged in the complaint are not material, competent or relevant.

(f) The Findings against Petitioner regarding trade organizations or the activities of trade organizations or

members thereof, of which trade organizations Petitioner was never a member or found to be a member are not material.

(g) The Findings as to acts done pursuant to or arising out of the National Industrial Recovery Act are not material because (1) the acts were done pursuant to authorization of law and (2) because the acts were definitely discontinued by Petitioner prior to the commencement of the proceeding and long prior to the date of the order.

3. The Finding in the preamble to the Commission's Findings that the proceeding is in the public interest, is not sustained by the evidence.

4. With respect to paragraph one:

The commission erred in subparagraph (1) in not finding that Petitioner became a member of The Cement Institute in June 1933 while the Cement Code was being formulated under the provisions of the National Industrial Recovery Act and because it deemed it necessary to join the Institute in order to participate in the formulation of the Code and in passing on any proposals for the amendment thereof, and that in so doing it sought and acted upon the advice of its attorneys that its action was in conformity with law.

5. With respect to paragraph two:

(a) The Commission erred in failing to find, as alleged in Petitioner's answer, that the interstate commerce of Petitioner has constituted only approximately four per cent of its total commerce, that due to distance and freight rates from out-of-state mills to market points in California there is practically no cement shipped from any other state into Southern California where Respondent has its principal market, and that there is practically no shipment of cement to Southern California from foreign countries.

(b) The Commission erred in finding (if it intended to so find) that Petitioner participated in, aided, assisted or cooperated with any other respondent in planning, doing or performing any of the acts or practices set forth in the Findings.

6. With respect to paragraph four:

(a) The Commission erred in failing to find that Petitioner has one cement mill, that its mill is located on property which it has owned since 1892, that its limestone is quarried from deposits on the property on which its mill

is located, that its mill and its source of its limestone have been located on the same property which has been owned by it since 1892, that the stock of the corporation is closely held, the great bulk of the stock being held by five stockholders, that substantially all of the stockholders are residents of Southern California, that no officer or director of the company is an officer or director of any other cement producer.

(b) The Commission erred in failing to find that Petitioner's interstate commerce is limited to central and western Arizona and southern Nevada where Petitioner is in direct competition at all places with at least three other producers.

(c) The Commission erred in finding in subparagraph (c) (if it is intended to be so found) that unity of purpose between Petitioner and any other respondent has been created or maintained, or that Petitioner in any manner used The Cement Institute as a vehicle for the formulation, expression or execution of collective plans or purposes, or that the Institute constituted such a vehicle.

(d) The Commission erred in failing to find in accordance with the evidence that in joining the Institute or in continuing membership therein Petitioner did not know or believe that the Institute was created or existed for any purposes not fully disclosed in its articles of association as they existed in 1933 or as they were amended December 11, 1933, and in failing to find that Petitioner or its officers have never known or believed that it has been a function of The Cement Institute to interpret the policies of the cement companies or to formulate policies for the industry, or that the Institute has existed or acted for the promotion of any combination among cement companies to hinder, lessen, restrict or restrain competition in price among cement manufacturers or to establish or maintain a "multiple basing point pricing system" or any system or method of pricing.

7. With respect to paragraph five:

(a) The Commission erred in failing to find that Petitioner has never been a member of any of the trade associations or organizations referred to in paragraph five except The Cement Institute.

(b) The Commission erred in making any finding as to Petitioner of activities or existence of any trade associations or organizations referred to in paragraph five other than activities of The Cement Institute after June 1933.

8. With respect to paragraph six:

(a) The Commission erred in making any finding against this Petitioner of any acts of trade associations of which Petitioner was not a member, or of acts of cement producers to which Petitioner was not a party.

(b) The finding (if it is intended to apply to Petitioner) that the cement industry or Petitioner as a member thereof has evidenced strong aversion to free competition, is not supported by the evidence.

(c) The finding that the members of the cement industry have made any understandings or agreements with respect to the development or maintenance of uniformity of action, or that they have developed or maintained substantial uniformity of action with respect to marketing procedure involving price or other competition, is not sustained by the evidence in so far as the finding is sought to be applied to Petitioner.

(d) The finding that any of the current practices of the cement industry originated in agreements between or among respondents, or have been supported by collective action, or have been modified or extended by collective action, is not sustained by the evidence in so far as it is sought to be applied against Petitioner.

(e) The finding that there have been restraints of competition among respondents, or that there is any belief that free and open competition is impracticable for the cement industry, or that there is any philosophy among respondents of seeking not to excel in quality or price or in affording terms of sale, is not supported by the evidence in so far as it is sought to be applied to Petitioner.

(f) The Commission erred in making any finding against Petitioner based upon any of the testimony set forth in paragraph (b), and in denying Petitioner's application for the limitation of the scope of such testimony.

(g) The finding, in so far as it is sought to be applied to Petitioner, that there is any general practice or policy among cement producers to maintain regular uniformity in price and terms and conditions of sale at a given location, or that cement is sold on the basis of entertainment or personal relationship without substantial competition in quality, price or terms, is not sustained by the evidence.

(h) The Commission erred in applying against Petitioner the testimony quoted in subparagraph (c).

9. With respect to paragraph seven:

(a) The finding that Petitioner has sold cement or made its prices under a pricing method or system described in paragraph seven, is not sustained by the evidence.

(b) The finding that Petitioner is known as a base mill or as a non-base mill, is not sustained by the evidence.

(c) The Commission erred in failing to affirmatively find that the findings in subparagraphs (a) to (l), inclusive, and (n) are not applicable to Petitioner, and in giving any consideration to such findings in determining the issues raised by the complaint against Petitioner.

(d) The findings in subparagraph (m) that the multiple basing point price system described in the complaint or in the findings was in existence in any of the area in which Petitioner markets cement, that Petitioner's pricing method is a modification of the basing point system, and that Petitioner published price lists showing its delivered prices at delivery points (except during the Code period), are not sustained by the evidence.

(e) The Commission erred in failing to affirmatively find that Petitioner or its officers have never known, considered or believed that the methods by which prices of cement have been fixed or quoted in Southern California or in any California markets where Petitioner has done business, or the methods by which prices of cement have been fixed or quoted in the parts of Arizona and Nevada in which Petitioner has done business, are the same as or similar to the price methods or systems described in the complaint as a multiple basing point price system.

(f) The Commission erred in making its findings in subparagraph (o) against Petitioner of alleged purposes or practices of The Cement Institute and of the provisions of its articles and code of ethics before the date that Petitioner became a member, and in giving any consideration to such findings in making any finding against Petitioner on the issues raised by the complaint.

(g) The Commission erred in failing to affirmatively find that Petitioner in joining or in maintaining its membership in The Cement Institute did not know or believe that the Institute existed or acted to establish or maintain a multiple basing point pricing system or any system or method of pricing, or to promote any contract, combination or conspiracy among cement companies to main-

tain any customs or usages or in any manner to hinder, lessen, restrict or restrain competition in price or otherwise, among cement manufacturers.

(h) The Commission erred in failing to affirmatively find that Petitioner has not met with any problem in the diversion of shipments of cement in transit, that Petitioner's trade areas are geographically separated from each other by ranges of hills or mountains or are widely separated by sparsely settled territory, and that differences in freight rates between trade areas when compared with price differentials offer no material advantage to diversion.

(i) The Commission erred in failing to affirmatively find that Petitioner did not use any form of sales contract recommended by any trade organization or by any other cement manufacturer, and did not follow any recommendations regarding specific sales contracts.

(j) The finding that the multiple basing point system was in effect in Petitioner's market area in 1933, and that the Institute was organized to maintain such pricing system in such area or to maintain any customs or usage in such area, is not sustained by the evidence.

(k) The Commission erred in considering or applying its findings in subparagraph (q) to Petitioner in making any finding against Petitioner on the charges alleged in the complaint, in that it appears from the evidence that Petitioner did not comply with the Code or follow the recommendations of the Trade Practice Committee or make any use of the Compendium or of the forms recommended in the Compendium after the date of the *Schechter* case decision.

(l) The Commission erred in considering or applying its findings in subdivision (r) in making any finding against Petitioner on the issues raised by the complaint, in that there is no evidence that Petitioner was a party to any of the determinations, efforts, acts or failures to act found in said paragraph.

(m) The Commission erred in failing to affirmatively find that Petitioner maintained its membership in The Cement Institute after May 1935 in response to and in reliance on solicitations by officers of the Institute and representations by such officers that the Institute would constitute a contact between the manufacturers of cement and the legislative and administrative bodies of the United

States Government in matters affecting cement companies in general, such as special taxes, tariffs, reciprocal trade agreements, improvement of government statistical services, etc., and wholly in the belief that a continuance of such membership would be beneficial for such reasons.

10. With respect to paragraph eight:

(a) The finding that it is necessary that Petitioner use or that Petitioner has used the pricing formula or the freight factor referred to in paragraph eight is not sustained by the evidence.

(b) The finding that members of the industry have combined to prepare or to disseminate freight rate information or the freight rate books referred to in paragraph eight is not sustained by the evidence as applied to Petitioner.

(c) The Commission erred in failing to affirmatively find that the Institute freight rate books have not covered areas included within Petitioner's market territory and that Petitioner has not received or used freight rate books or freight rate information other than the official rate tariffs of the carriers and the official rate tariffs of agents of carrier groups, and that Petitioner has had nothing whatever to do with the preparation or distribution of the Institute freight rate books or with the use thereof by any other respondent.

(d) The Commission erred in considering or applying any finding in subparagraphs (a) to (g) inclusive in making any findings or conclusion against Petitioner on any of the issues raised by the complaint, in that the evidence affirmatively shows that petitioner did not participate in the activities so found, and by that there is no evidence that Petitioner made or was a party to any contract or combination with respect to such activities.

(e) The finding in subparagraph (h) that Petitioner cooperated or participated in any agreement or activities for the cooperative dissemination of land grant rates, or that Petitioner made any use of land grant rates or quotations thereof as a means of attaining or maintaining identical delivered prices, is not sustained by the evidence.

(f) The finding in subparagraph (i) that Petitioner ordinarily determined the delivered price to be bid according to the formula recited in said paragraph or a similar formula, is not sustained by the evidence.

(g) The finding in subparagraph (i) (if it is so found)

that respondent participated in any interchange or agreement to interchange land grant rate information or in the use of land grant information, in fixing bid prices, is not sustained by the evidence.

(h) The Commission erred in failing to affirmatively find that it has been the policy and practice of Petitioner to determine and make its bids on Government invitations for destinations where land grant rates are available on a basis under which identity in the bid prices of competitors is not possible and knowledge of exact land grant rates is not material.

(i) The finding in subparagraph (j) that land grant rates became of importance to petitioner only after the expansion of Government business in the recovery program, is not sustained by the evidence, in that land grant rates have always been a factor in fixing competitive prices for Government sales.

(j) The finding (if it is so found) in subparagraph (j) that petitioner participated in any activities or agreement, or efforts, to make identical bids to the Government, is not sustained by the evidence.

(k) The finding (if it is so found) that petitioner participated in any acts, efforts, or agreement with any other cement producer to deprive the Government of the full benefit of land grant rates, or to use the "control clause" for any such purpose, or to make identical bids to the Government, is not sustained by the evidence.

(l) The finding (if it is so found) that Petitioner used the "control clause" in making Government bids after the decision in the *Schechter* case, is not sustained by the evidence.

(m) The finding in subparagraph (1) (if it is so found) that petitioner was a party to any acts, efforts, or agreement, with any other cement producer in developing or using any method or plan for handling Government bids, or in fixing the amount of Government bids, is not sustained by the evidence.

(n) The Commission erred in considering or applying its finding in subparagraph (1) of declarations of other respondents in making any finding or conclusion against petitioner or any issue raised by the complaint, in that there is no evidence that Petitioner participated in or authorized the declarations, or that they were made in furtherance, or performance of any agreement to which Petitioner was a party.

(o) The finding in subparagraphs (m) and (n) (if it is so found) that petitioner authorized, participated in or made any use of any of the activities found in said subparagraphs, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that Petitioner did not furnish any land grant rate information to The Cement Institute, or make any use whatever of any land grant rate information which may have been disseminated by the Institute.

(p) The finding in subparagraph (o) (if it is so found) that Petitioner published price lists showing commercial delivered prices at destinations, or that Petitioner furnished its office price lists to any other cement producer, or that Petitioner participated in any effort to plan with any other cement producer to maintain identical prices, is not sustained by the evidence.

(q) The finding in subparagraph (o) (if it is so found) that Petitioner participated in any interchange of land grant rates with any other respondent, is not sustained by the evidence.

(r) The finding in subparagraph (o) that the collection and dissemination of land grant rate information is or has been one of the principal activities of Pacific Coast Cement Institute, or that there was any relationship whatever between Pacific Coast Cement Institute and The Cement Institute, or that land grant rate information was collected or disseminated by Pacific Coast Cement Institute for the purpose of enabling its members to make identical bids on Government invitations, or that Petitioner ever used any such land grant rate information for the purpose, or with the effect, of attaining identity in bid price with any other cement producer on Government invitations, is not sustained by the evidence.

11. With respect to paragraph nine:

(a) The finding in subparagraph (a) (if it is so found) that Petitioner uses the pricing formula described in the complaint and in the findings, or that identical prices at given destinations result from any contract, combination, or conspiracy to which Petitioner is a party, is not sustained by the evidence.

(b) The Commission erred in considering or applying its findings in subparagraph (a) with respect to invoices or sales by cement producers in making any finding or conclusion against Petitioner on any issue raised by the

complaint, in that it appears from the evidence that none of the invoices referred to covered any sale made by Petitioner, and in that it appears that Petitioner was not a party to any of the transactions evidenced by the invoices.

(c) The Commission erred in considering or applying its findings in subparagraph (b) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that it appears from the evidence that Petitioner was not a party to any of the transactions referred to, and that none of the transactions was had pursuant to any agreement to which petitioner was a party.

12. With respect to paragraph ten:

(a) The Commission erred in considering or applying any of the findings in paragraph ten in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner in any manner participated in any of the acts, practices or declarations, and in that none of such findings is relevant, competent or material on any issue against Petitioner.

13. With respect to paragraph eleven:

(a) The Commission erred in considering or applying any finding in paragraph eleven in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner joined in or was a party to any of the acts, practices or declarations found in said paragraph, and in that it affirmatively appears from the evidence that Petitioner's practices and policies with respect to the delivery of cement by truck and permitting buyers to take delivery at the mill were directly contrary and opposed to the acts, practices and declarations found in said paragraph.

(b) The finding in subparagraph (b) (if it is so found) that Petitioner cooperated or agreed with any other cement producer or interested group in taking any steps or doing any acts to eliminate, discourage or control the trucking of cement, is not sustained by the evidence.

(c) The finding in subparagraph (d) (if it is so found) that Petitioner was a party to any plan to discourage or control trucking, or that the plans referred to in the paragraph are illustrative of any plan to which Petitioner was a party, is not sustained by the evidence.

(d) The finding in subparagraph (g) (if it is so found)

that Petitioner followed or observed or made any use of any plan or any provision of the Code or of the Compendium to discourage, eliminate or prevent the trucking of cement, or was a party to any plan or agreement so to do, is not sustained by the evidence.

(e) The finding in subparagraph (h) (if it is so found) that Petitioner participated in any movement or plan to control the trucking of cement, is not sustained by the evidence.

14. With respect to paragraph twelve:

(a) The finding in subparagraph (a) (if it is so found) that Petitioner used the multiple basing point delivered price system described in the complaint and in the findings, or that it used the system pursuant to any contract, combination or conspiracy with any other cement producer or respondent for the purpose of maintaining uniform prices at each given location, or that Petitioner either in combination or by contract with other cement producers or otherwise adopted or followed a practice or policy to forbid or prevent diversions of cement in transit, or that petitioner had any experience with any desire or practice of purchasers to divert cement in transit, is not sustained by the evidence.

(b) The findings in subparagraph (b) (if it is so found) that Petitioner participated in any adoption of the "Code of Ethics" provision respecting diversions in transit, is not sustained by the evidence.

(c) The Commission erred in considering or applying any of its findings in subparagraph (b) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner followed any of the practices, policies, or provisions provided for in the "Code of Ethics," the Code, the "Compendium," or the standard forms of sales contract, in that the adoption of the Compendium or the standard forms of sales contract were not activities of the Institute authorized by Petitioner, and in that the evidence affirmatively shows that petitioner did not use the recommended form of sales contract, did not make any use of or follow the recommendations of the "Compendium," and did not experience any desires or attempts of its customers to divert cement in transit.

(d) The findings in subparagraph (c) (if it is so found) that it was Petitioner's practice in invoicing cement at

destination prices to provide for the payment of freight by the purchaser, or that Petitioner adopted or maintained any policy in such respect by agreement or combination with any other cement manufacturer, is not sustained by the evidence. The Commission erred in failing to expressly find that Petitioner's practice regarding payment of freight varied with different customers and different destinations, and that where payment of freight by the purchaser is provided for the object is to keep down the investment in prepaid freight.

(e) The Commission erred in considering or applying its findings in subparagraph (e) concerning the 1929 recommendation of the Institute and concerning the acts and declarations of persons other than Petitioner, in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that the events occurred and declarations were made before Petitioner became a member of the Institute, and there is no evidence that Petitioner was a party thereto, or that the same were in furtherance or performance of any agreement to which Petitioner was a party.

(f) The Commission erred in considering or applying its findings in subparagraph (d) making any finding or conclusion against Petitioner on any issue raised in the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations, or that the acts or declarations were in furtherance or performance of any agreement to which Petitioner was a party.

(g) The findings in subparagraph (e) (if it is so found) that Petitioner did or participated in the acts or practices therein found either by itself or in furtherance or performance of any agreement with any other cement producer, or that Petitioner was a party to any contract or combination to adopt or maintain any such policy or practice, is not sustained by the evidence, and the Commission erred in considering or applying any finding in such subparagraph in making any finding or conclusion against Petitioner on any issue raised by the complaint.

15. With respect to paragraph thirteen:

(a) The finding in subparagraph (a) that Petitioner's "specific job contracts" constitute merely an option to the purchaser, is not sustained by the evidence.

(b) The finding in subparagraph (a) (if it is so found) that Petitioner participated in the collection of statistical

data regarding specific job contracts with any respondent other than its three Southern California competitors, or for the purpose of protecting a price system, or for any purpose other than to prevent fraud, or that it participated with any other respondent or cement producer to effect cancellation of any specific job contracts, is not sustained by the evidence.

(c) The finding in subparagraph (a) (if it is so found) that Petitioner participated in or made any use of any collection or dissemination of specific job contract information by The Cement Institute, is not supported by the evidence, and the Commission erred in failing to affirmatively find that Petitioner has never furnished to The Cement Institute any information concerning specific job contracts or other contracts for the future delivery of cement.

(d) The finding in subparagraph (b) (if it is so found) that Petitioner had any interest jointly with any other respondent or cement producer to cancel specific job contracts for excessive or fraudulent quantities of cement, or that Petitioner was a party to or authorized or had any connection with the declarations referred to in the subparagraph, or that the declarations were in pursuance of any agreement or combination to which Petitioner was a party is not sustained by the evidence.

(e) The Commission erred in considering or applying its finding in paragraph (c) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to or authorized the acts or declarations therein referred to, or that the acts or declarations were in pursuance or performance of any agreement or combination to which Petitioner was a party.

(f) The finding in subparagraph (d) (if it is so found) that Petitioner was a party to any of the contract checking activities of The Cement Institute, or that such activities were authorized by Petitioner, or done in furtherance or performance of any agreement or combination to which Petitioner was a party, is not sustained by the evidence, and the Commission erred in failing to make the affirmative finding directly to the contrary.

(g) The Commission erred in considering or applying any of its findings in subparagraph (e) in making any finding or conclusion against Petitioner on any issue raised

by the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations therein referred to, or that the acts or declarations were in furtherance or performance of any contract or combination to which Petitioner was a party.

(h) The Commission erred in considering or applying any of its findings in subparagraphs (f) and (g) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner did, or made, or participated in the doing or making of any of the acts or declarations referred to in the subparagraphs, in that there is no evidence that Petitioner used the standard form of specific job contract, or a form similar in terms, or that Petitioner observed the recommendations of the Compendium, in that the evidence affirmatively shows directly the contrary, and in that there is no evidence that the acts or declarations were authorized by Petitioner or were done or made in furtherance or performance of any contract or combination to which Petitioner was a party.

16. With respect to paragraph fourteen.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner used the multiple basing point price system or that it used it by collective action with any other respondent or cement producer, or that it adopted or maintained terms or conditions of sale which were the same as or standard with other cement producers or respondents, or that it adopted or maintained terms and conditions of sale by collective action with any other respondent or cement producer, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that Petitioner's terms and conditions of sale are and have been materially different from those alleged in the complaint and those recommended in the Compendium.

(b) The Commission erred in considering or applying any of its findings in subparagraphs (b), (c), (d) and (e) in making any finding or conclusion against the Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations therein referred to, in that there is no evidence that any of the acts or declarations were done or made in furtherance or performance of any contract or

combination to which Petitioner was a party, in that the acts and declarations are remote in point of time and for the most part were long before the date of any action of Petitioner shown by the evidence.

(c) The Commission erred in considering or applying its findings in subparagraph (f) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that it affirmatively appears from the evidence that Petitioner's practice with respect to cash discount and sack refund both before and after the Code period were different from the practices provided for by the Code, and that Petitioner's actions during the Code period, as shown by the evidence, were done pursuant to the requirements or provisions of the National Industrial Recovery Act.

(d) The Commission erred in considering or applying its findings in subparagraph (g) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner adopted or followed any of the practices recommended in the Compendium, or that the Compendium was adopted pursuant to any authorization or agreement to which Petitioner was a party, or that any of Petitioner's marketing practices were adopted or maintained pursuant to agreement or combination with any other respondent or cement producer.

17. With respect to paragraph fifteen.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner was a party to any contract or combination or any action or policy with any other respondent or cement producer for the harmonizing of production with shipments of cement or for the maintaining of a division of available business among producers or for the collection or dissemination of statistics which revealed Petitioner's or any other producer's volume of production or sales, is not sustained by the evidence.

(b) The Commission erred in considering or applying any of its findings in subparagraph (b) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations therein referred to, or that any of said acts or declarations

was done or made in furtherance or performance of any agreement or combination to which Petitioner was a party, in that for the most part the acts and declarations took place before the dates as to which there is any evidence regarding Petitioner.

(c) The Commission erred in considering or applying any of its findings in subparagraph (c) in making any finding or conclusion against Petitioner upon any issue raised by the complaint, in that there is no evidence that Petitioner was a party to any act or declaration or practice therein referred to, in that it affirmatively appears from the evidence that Petitioner at no time furnished any information for the Mallory statistics or subscribed for, or made any use of, the Mallory reports, and the Commission erred in failing to affirmatively so find.

(d) The Commission erred in considering or applying any of its findings in subparagraphs (d), (e) and (f) in making any finding or conclusion against Petitioner upon any issue raised by the complaint, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations referred to or that any of the acts or declarations were in furtherance or performance of any agreement or combination to which Petitioner was a party.

(e) The Commission erred in considering or applying its findings in subparagraph (g) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to any agreement or combination which provided for the formulation of any plan for the sharing of available business, or that Petitioner in any way authorized the Code provision referred to or any actions done or declarations made thereunder or was a party to any such actions or declarations, and in that it affirmatively appears from the evidence that Petitioner has never furnished to The Cement Institute any information concerning production or stocks on hand or any information concerning shipments except that furnished for the purpose of fixing dues.

(f) The Commission erred in considering or applying any of its findings in subparagraph (h) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that

Petitioner was a party to or authorized any acts or declarations therein referred to, or that any of said acts or declarations was done or made in furtherance or performance of any agreement or combination to which Petitioner was a party.

(g) The Commission erred in considering or applying any of its findings in subparagraphs (i) and (j) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations, or that any of the acts or declarations were done or made in furtherance or performance of any agreement or combination to which Petitioner was a party, and in that it affirmatively appears that Petitioner did not subscribe to the Mallory reports, furnish any statistical data therefor, or make any use of the statistical data therein.

18. With respect to paragraph sixteen.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner cooperated or did any acts in cooperation with any other respondent or cement manufacturer to prevent increases of production of cement, or to prevent interference with or maintain price stability, or to oppose the entry of new production and competitors into the industry, is not supported by the evidence.

(b) The Commission erred in considering or applying its finding in subparagraph (b) in making any finding or conclusion against Petitioner, in that there is no evidence that any action in adopting the Code, or any action of the Code Authority, or of the trustees of The Cement Institute, which might have been contrary to or beyond the actions authorized by the National Industrial Recovery Act, were participated in or authorized by Petitioner, or done in furtherance or performance of any agreement or combination to which Petitioner was a party.

(c) The Commission erred in considering or applying its findings in subparagraph (c) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner participated in or authorized any of the acts or declarations referred to in said paragraph, or that any of said acts or declarations were done pursuant to any agreement or combination to which Petitioner was a party.

(d) The Commission erred in considering or applying any of its findings in subparagraph (d) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations referred to in said subparagraph, or that any of the acts or declarations were done or made in furtherance or performance of any agreement or combination to which Petitioner was a party.

(e) The finding in subparagraph (e) (if it is so found) that Petitioner was a party to or authorized the acts referred to in the subparagraph or that the acts were done pursuant to any agreement or combination to which Petitioner was a party, is not sustained by the evidence.

(f) The Commission erred in considering or applying any of its findings in subparagraph (f) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations therein referred to, or that any of said acts or declarations were done or made pursuant to any agreement or combination to which Petitioner was a party.

19. With respect to paragraph seventeen.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner made any agreement or understanding, or worked or cooperated, with any other respondent or with groups of dealers or with any dealer organization, to secure uniformity in dealer prices or dealer policies, to minimize price competition among dealers or competitive conflicts between cement producers and dealers or among dealers, or to reduce irregularities in sales by individual dealers, or to eliminate or avoid disturbances or irregularities in dealer prices or policies, is not sustained by the evidence.

(b) The finding in subparagraph (b) (if it is so found) that Petitioner participated in any concerted action by cement producers or respondents with respect to dealers or dealer policies, or that it authorized or participated in any activities of any trade association with respect to dealers and dealer policies, is not sustained by the evidence.

(c) The Commission erred in considering or applying any of its findings in subparagraphs (b) and (c) in making any finding or conclusion against Petitioner on any

issue raised by the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations therein referred to, in that there is no evidence that any of the acts or declarations were made in furtherance or performance of any contract or combination to which Petitioner was a party, and in that the acts and declarations were remote in point of time.

(d) The finding in subparagraph (d) (if it is so found) that the Code provisions and Code practices respecting relations with dealers were in accordance with Petitioner's dealer policies or constituted a step in the development of Petitioner's dealer policies, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that Petitioner's dealer policies and practices were distinctly different from the Code policies during the period before the Code and during the period following the Schechter decision.

(e) The Commission erred in considering or appyling any of its findings in subparagraphs (e) and (f) in making any finding or conclusion against Petitioner on any issue raised by the complaint, in that there is no evidence that Petitioner was a party to any of the acts or declarations therein referred to, in that there is no evidence that any of the said acts or declarations were done or made in furtherance or performance of any contract or combination to which Petitioner was a party, and in that none of the acts or declarations had any reference whatever to interstate commerce of Petitioner or interstate commerce in Petitioner's market territory.

20. With respect to paragraph eighteen.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner was a party to any concerted action to establish a division of business among cement producers and dealers, or to establish a division of sales to the Government among producers and dealers, or to any concerted action to establish or maintain a practice or policy that producers make direct sales to Federal agencies, or to any concerted action to change the policy or establish a new policy that sales of cement for emergency or unemployment agencies be made by dealers, is not sustained by the evidence, and the Commission erred in considering or applying any such finding in making any finding or conclusion against Petitioner.

(b) The finding in subparagraph (b) (if it is so found) that the action therein referred to was taken for the purpose stated in the subparagraph or that Petitioner participated in or authorized the action for such purpose or at all, or that the action was taken in furtherance or performance of any contract or combination to which Petitioner was a party, is not sustained by the evidence.

(c) The Commission erred in considering or applying any of its findings in subparagraphs (b) and (c) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was party to or authorized any of the acts or declarations therein referred to, or that any of the acts or declarations were done or made in furtherance or performance of any contract or combination to which Petitioner was a party.

21. With respect to paragraph nineteen.

(a) The Commission erred in considering or applying any of its findings in paragraph nineteen in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations, in that there is no evidence that any of the acts or declarations were done or made in furtherance or performance of any contract or combination to which Petitioner was a party, and in that it affirmatively appears to the contrary.

(b) The Commission erred in failing to affirmatively find that for many years the quantities of foreign cement imported into the area in which Petitioner has had its market is negligible and that the importation of foreign cement was not a factor which influenced competition in price or policy in the sale of cement in such territory.

(c) The finding in subparagraph (c) (if it is so found) that Petitioner made any filings of prices with the Trade Practice Committee of the Institute, or received any reports of prices from the Committee, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that Petitioner was not one of the respondents referred to in said subparagraph.

22. With respect to paragraph twenty.

(a) The Commission erred in considering or applying any of its findings in subparagraphs (a), (b) and (c) in making any finding or conclusion against Petitioner, in that it affirmatively appears from the evidence that Peti-

tioner was not a member of the Association of American Portland Cement Manufacturers or Portland Cement Association, and was not a member of The Cement Institute prior to June, 1933, in that the Code provision was adopted in the manner provided by statute, in that it appears that Petitioner did not follow or pay attention to the Compendium, in that there is no evidence that any of the actions referred to were participated in by Petitioner or taken pursuant to or in furtherance of any contract or combination to which Petitioner was a party, and in that there is no evidence whatever that Petitioner followed any of the recommendations or provisions referred to.

(b) The finding in subparagraph (d) (if it is so found) that the cement producers dominated the A. S. T. M., that there has been opposition to higher specification requirements from cement producers, or that Petitioner has been a party to such domination or opposition or that such domination or opposition is in furtherance or performance of any combination or agreement to which Petitioner is a party, is not sustained by the evidence.

(c) The finding in subparagraph (e) (if it is so found) that Petitioner has refrained from advertising qualities of cement, or has participated in any policy or publicity regarding standards of quality, or has been a party to any cooperative action for such purposes, is not sustained by the evidence.

(d) The Commission erred in considering or applying any of its findings in subparagraphs (e) and (f) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner authorized or participated in any of the acts or declarations referred to, and in that there is no evidence that the acts or declarations were done or made in furtherance or performance of any contract or combination to which Petitioner was a party.

(e) The finding in subparagraph (g) (if it is so found) that the purpose of the Institute's advertising was in furtherance of a contract or combination to maintain a pricing system or to hinder, lessen or restrict competition in price, or that Petitioner had any knowledge of any such purpose, or that advertising for such purpose was authorized by Petitioner, is not sustained by the evidence.

(f) The finding or inference in subparagraph (h) (if it is so found or inferred) that Petitioner either by itself or by cooperative action with other cement producers has

concealed from dealers any information rearding differences in cement quality, or that dealers are not fully informed concerning cement qualities, is not sustained by the evidence.

23. With respect to paragraph twenty-one.

(a) The finding in subparagraph (a) that there were substantial advances in prices of cement in Petitioner's market territory in 1932 and 1933, or that there was identity in bid prices on public projects in such territory in 1932 or 1933 or at other times, or that there were protests from public or private sources on account of cement prices, is not sustained by the evidence.

(b) The Commission erred in considering or applying any of its findings in subparagraphs (a) and (b) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was a party to or authorized any of the acts or declarations referred to in said paragraphs, in that there is no evidence that the acts or declarations were done or made in furtherance or performance of any contract or combination to which Petitioner was a party, and in that there is no evidence that the conditions which are found to have given rise to the acts and declarations existed in Petitioner's market territory.

(c) The Commission erred in considering or applying any of its findings in subparagraphs (c), (d), (e), (f) and (g) in making any finding or conclusion against Petitioner or any issue raised by the complaint, in that there is no evidence that petitioner had any information, belief or knowledge (and Petitioner still has no information, belief or knowledge) that any of the activities of the Institute or its committees referred to in said subparagraphs was undertaken or carried out for any purpose not expressed in its Articles of Association, or for a purpose to protect a basing point system of pricing, or to maintain any general marketing methods, or to further or perform any contract, combination or conspiracy to hinder, lessen or restrict competition in price in interstate commerce.

(d) The Commission erred in considering or applying its findings in subparagraphs (b), (c), (d), (e) and (f) of declarations by individuals and by the Committee, in making any finding or conclusion against Petitioner upon any issue raised by the complaint, in that there is no evidence that Petitioner was a party to, authorized or con-

sented to any of such declarations, and in that there is no evidence that the declarations were made in furtherance or performance of any contract or combination to which Petitioner was a party.

(c) The Commission erred in considering or applying its finding in subparagraph (g) in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner had any knowledge or belief that the employment of Professors Clark and Burns was for any purpose not authorized by the Articles of Association of the Institute, or was for any purpose of furthering or carrying out any contract or combination to maintain the basing point system or to hinder, lessen or restrict competition in price in interstate commerce, in that there is no evidence that the declarations therein found were authorized by, consented to, or adopted by Petitioner, or were in furtherance or performance of any contract or combination to which Petitioner was a party.

24. With respect to paragraph twenty-two.

(a) The finding in subparagraph (a) (if it is so found) that the testimony of the Commission's economists dealt with the economic aspects of Petitioner's method of pricing in its interstate commerce, with Petitioner's marketing practices, with competition in the territory in which petitioner carries on interstate commerce or with the economic effects of Petitioner's marketing practices, or that said economists testified concerning the application of the theories which they expounded to Petitioner's practices or the practices prevailing in the territory in which Petitioner carries on interstate commerce, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that the testimony of the Commission's economists did not apply to Petitioner or to Petitioner's method of pricing or its marketing practices.

(b) The finding in subparagraph (b) (if it is so found) that the Commission's economists testified that Petitioner's method of pricing and the phenomena of Petitioner's marketing practices contravene recognized principles of economics indicating competition, or affirmatively indicate absence of competition, or would require disciplinary or cooperative action among competitors, is not sustained by the evidence, and the Commission erred in failing to affirmatively find that the testimony of the Commission's economists on such subjects had no relation to the pricing

methods and marketing methods prevailing in the territory in which Petitioner has carried on interstate commerce.

(c) The finding and conclusion in subparagraph (c) (if it is so found) that identical delivered prices at destinations in the territory in which Petitioner has carried on interstate commerce would not or could not result from free competition in the sale of cement to well informed buyers, or that Petitioner's prices in its interstate commerce are not the result of competitive market action but are expressions of a non-competitive or monopolistic price structure, or that identity in prices bid on Government invitations will not result from competition, is not sustained by the evidence.

(d) The Commission erred in considering or applying the testimony of the Commission's economists and its findings of the effect of such testimony, in making any finding or conclusion against Petitioner, in that the testimony of such economists was not directed to the pricing methods or the marketing practices used by Petitioner.

25. With respect to paragraph twenty-three.

(a) The finding in subparagraph (a) (if it is so found) that Petitioner used the multiple basing point price system, or that the pricing method used by Petitioner in its interstate commerce is a discriminatory method of pricing, or that Petitioner's said method of pricing is discriminatory whether "true price" is destination price including freight or destination price less freight, or that the hypothetical illustration set up in subsection (g) of paragraph seven is illustrative of Petitioner's method of pricing, or that under Petitioner's method of pricing the differences between delivered prices at different destinations are not the result of and do not correspond to differences in cost of delivery or are not made in good faith to meet equally low prices of a competitor, are not sustained by the evidence, and the Commission erred in considering or applying its findings in subparagraph (a) in making any finding or conclusion against Petitioner.

(b) The finding that the tabulation in subparagraph (b) examples or illustrates the results which would be shown by corresponding data for Petitioner's prices in interstate commerce is not sustained by the evidence, and the Commission erred in considering or applying its findings in subparagraph (b) in making any finding or conclusion against Petitioner.

(c) The finding in subparagraph (c) (if it is so found) that there is much cross hauling of cement in the territory in which Petitioner carries on interstate commerce, or that there is any waiver of advantage in natural sales location by Petitioner or any competitor of Petitioner in selling cement in such territory, or that the method of pricing used by Petitioner has any effect to maintain a price level which is unfair or which permits competition by more remotely located mills, is not sustained by the evidence, and the Commission erred in considering or applying its findings in such respects regarding conditions in other trade territories in making any finding or conclusion against Petitioner.

(d) The Commission erred in considering or applying its finding in subparagraph (c) relative to the freight costs of cross hauling in making any finding or conclusion against Petitioner in that there is no evidence that there is any substantial cross hauling in the territory in which Petitioner conducts its interstate commerce.

(e) The finding in subparagraph (e) (if it is so found) that Petitioner made any numerous or substantial increases in cement prices in 1932 and 1933, or that prices in effect in Petitioner's trade area in 1932 and 1933 continued substantially unchanged in 1938, or that cement prices have shown a high degree of rigidity in Petitioner's trade area, is not sustained by the evidence, and the Commission erred in failing to affirmatively find in accordance with the evidence that competition in price in the sale of cement has been active and intense during the said period throughout the areas in which Petitioner has done business, that during the said period there have been approximately ten (10) changes in Petitioner's price list prices.

(f) The finding or conclusion in subparagraph (f) that the prices of cement and other conditions respecting commerce in cement in the territory in which Petitioner has done business tend to support a conclusion of restraint of competition in such area is not sustained by the evidence.

26. With respect to paragraph twenty-four.

(a) The findings in subparagraphs (a) and (b) (if it is so found) that under Petitioner's method of pricing cement in its interstate commerce the delivered price is not the actual or the true price and that the actual or true price is the delivered price less freight, that Peti-

tioner's sales in interstate commerce at different destinations are "at almost as many true prices as there are customers' locations," that Petitioner discriminates in price by making sales at such prices, that Petitioner has adopted and follows its method of pricing for any purpose to prevent, lessen or destroy competition in price with its competitors, that its use of such pricing method had any effect to prevent, lessen or destroy competition in price, that Petitioner uses the multiple basing point price system either in contract or combination with other respondents or at all, that Petitioner uses its methods of pricing in order that there may not be genuine competition in price, or that the use of the method of pricing results in the obtaining of varying mill nets, is not sustained by the evidence.

(b) The finding in subparagraph (c) (if it is so found) that Petitioner's course of conduct in its interstate commerce has been inconsistent with the conclusion that its delivered price is its true price, that Petitioner has a fixed custom or practice that purchasers of cement pay the freight charges, that Petitioner has changed its practice regarding the collection of freight charges or regarding the risk of loss in transit, that in selling or delivering cement Petitioner has an intention or practice regarding the passage of title or the risk of loss different from the ordinary rules of law of sales, or that in the course of its business or in its accounting practices Petitioner has referred to and treated its mill net as its "true price," is not sustained by the evidence.

(c) The Commission erred in considering or applying its findings in paragraph 23 regarding acts, policies and declarations of companies and persons other than Petitioner, in making any finding or conclusion against Petitioner, in that there is no evidence that Petitioner was a party to or authorized any of the acts, policies or declarations, or that the acts, policies or declarations were in furtherance or performance of any contract or combination to which Petitioner was a party.

(d) The finding in subparagraph (d) (if it is so found) that Petitioner used the multiple basing point price system, that Petitioner used such system or its own method of pricing in furtherance or performance of any contract or combination with any other respondent or person, that Petitioner used such system or its own method of pricing for the purpose of avoiding price competition, that Petitioner's

delivered prices for destinations for which a competitor has a freight advantage and a lower price are not made by Petitioner in good faith to meet an equally low price of a competitor, that Petitioner's delivered prices in its interstate commerce where not made in good faith to meet an equally low price of a competitor do not reflect only due allowance for differences in cost of delivery, is not sustained by the evidence.

(e) The Commission erred in failing to affirmatively find in accordance with the evidence that in selling cement in interstate commerce the differentials in Petitioner's prices at different destinations make only due allowance for differences in the cost of delivery resulting from the different methods in which the commodities are delivered except where changes are made in response to changing conditions affecting the market for the goods concerned or except where sales are made or prices are quoted in good faith to meet equally low prices of a competitor.

(f) The finding in subparagraph (e) (if it is so found) that Petitioner's "true price" in its interstate commerce is its mill net after the deduction of freight, or that whether the "true price" is the delivered price or the mill net Petitioner's prices are discriminatory and not justified by differences in cost of delivery, is not sustained by the evidence.

27. With respect to paragraph twenty-five.

(a) The finding in the words of the statute is not a proper finding on the issues raised by Petitioner, and the Commission erred in failing to find on Petitioner's evidence on such issues.

(b) The Commission erred in failing to affirmatively find in accordance with the evidence that the geography of the areas in which differences in price exist between different destinations is such that there is no commerce in cement between such destinations and no competition between persons dealing in, buying, or using cement in the different destinations, that differences in price in different destinations can and do have no effect on competition in the sale and distribution of cement with cement manufacturers who make such different prices or with persons who buy at such prices or with customers of either of them.

28. With respect to paragraph twenty-six.

(a) The Commission erred in considering or applying its findings and conclusions in paragraph twenty-six in

making any finding or conclusion against Petitioner, in that it is not found or concluded that the combination referred to related to interstate commerce in the territory in which Petitioner has carried on interstate commerce, in that is it not found or concluded that the acts or practices performed thereunder or in connection therewith had any relation to interstate commerce in the territory in which Petitioner carries on interstate commerce, and in that it is not found that the capacity, tendency or effect of the alleged combination or of any acts or practices performed thereunder have been to hinder, lessen, restrain or suppress competition in the sale and distribution of cement in the area in which Petitioner carries on interstate commerce in cement.

(b) The conclusion of the Commission against Petitioner, is not supported by the evidence or by the findings and is contrary to law.

29. With respect to the Exceptions to the Examiner's Report:

(a) The Commission erred in generally adopting the substance of the Trial Examiner's Report upon the Evidence and in overruling Petitioner's Exceptions to the Examiner's Report.

(b) The Commission erred in following the Examiner's Report in selecting the issues and subjects to which the findings are limited and in not finding upon the issues without the inclusion of evidentiary matter alleged to be illustrative of the subject-matter covered by the findings.

(c) The Commission erred in not finding upon affirmative defenses and affirmative evidence of Petitioner as set forth in the Exceptions to the Examiner's Report.

(d) The Commission erred in following the Examiner's Report in failing to find on each issue with respect to this Petitioner, a failure which was excepted to in Petitioner's Exceptions to the Examiner's Report.

III.

The Commission erred in the reception and rejection of evidence, and in other particulars in respect of the proceedings herein, apparent of record.

30. The Commission erred in affirming the ruling of the Examiner overruling the objections of Petitioner to the admission of exhibits and other evidence made at pages

22217-22218 of the Transcript by adopting the objections stated in the objections and motion of respondents Santa Cruz Portland Cement Co. and others, marked for identification as Respondents' Exhibit 390 [Examiner's ruling at Tr. pp. 22432-22433].

31. The Commission erred in affirming, with the exceptions noted in its order dated August 29, 1939, the ruling of the Examiner denying Petitioner's motion to strike or to exclude Petitioner from the effect of, certain evidence, made at pages 22217-22218 of the Transcript by adopting the motion of Santa Cruz Portland Cement Co. and others marked for identification as Respondents' Exhibit 390.

32. The Commission erred in affirming the Examiner's ruling overruling the objections to the admission of, and in admitting in evidence, the Pacific Coast Institute land grant rate letters identified at the bottom of page 9253 and the top of page 9254 of the Transcript.

33. The Commission erred in affirming the Examiner's ruling overruling the objections to the admission of testimony regarding the strictly intrastate commerce of Petitioner as shown at Transcript pages 42533, 42537.

34. The Commission erred in affirming rulings of the Examiner excluding material evidence offered on behalf of Petitioner respecting matters which are the subject of findings made by the Commission as set forth in paragraph 39(m) of the Statement of Points of Aetna Portland Cement Company et al. in case No. 8360, and Petitioner adopts such paragraph (m).

35. The Commission erred as is set forth in paragraphs 40, 43 and 44 of the Statement of Points of Aetna Portland Cement Company et al. in case No. 8360, and Petitioner adopts such paragraphs.

IV.

36. The Commission erred in denying Petitioner's motion to dismiss the complaint.

Dated March 15, 1944.

Respectfully submitted,
Alex W. Davis,
Robert B. Murphey,
Attorneys for Petitioner.

Murphey and Davis,
Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8409) * *

(Filed March 17, 1944. Kenneth J. Carrick, Clerk.)

Your petitioners hereby adopt the statement of points upon which petitioners intend to rely filed on behalf of Aetna Portland Cement Co., et al, Case No. 8360; The Cement Institute, et al, Case No. 8361; and Blaine S. Smith, et al, Case No. 8410.

Respectfully submitted,
Monolith Portland Cement Company and
Monolith Portland Midwest Company,
By William D. Burnett,
Attorney.
215 West 7th Street,
Los Angeles, California.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8360-8361-8410) * *

NOTICE AND MOTION FOR SIMPLIFYING THE RECORD AND REDUCING THE PORTIONS WHICH HAVE TO BE PRINTED.

Please Take Notice that on the 27th day of December, 1943, we are filing with the Hon. Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit a joint and several motion on behalf of the above named petitioners seeking relief from an order entered by the Federal Trade Commission on July 17, 1943, in the matter of The Cement Institute, et al. *vs.* Federal Trade Commission, Docket 3167 for an order granting the following relief:

Physical exhibits

1. That all of the exhibits filed by the Secretary of the Federal Trade Commission, hereinafter referred to as the

"original exhibits", properly before this Court on review, shall be physical exhibits, and that as such they shall constitute for all purposes a part of both the record on review and on any petition for certiorari to the Supreme Court of the United States that may be filed in this cause, and copies of such exhibits shall not be printed. That said original exhibits shall be stored by the Clerk of this Court in his office, Chicago, Illinois, pursuant to the rules and practices of this Court and in such manner as he may deem reasonably appropriate for their presentation and so that they will be available at all reasonable times to the parties and to the Court for inspection and examination during the pendency of these causes in this Court.

2. That any written Motion, Petition, together with supporting affidavits and statements, or Statement of Contentions filed with the Trial Examiner or the Federal Trade Commission may be submitted to the Court in the original form in which they were submitted to the Trial Examiner or to the Federal Trade Commission, with the same force and effect as though printed.

Designation of Evidence

3. That, in designating the portions of the record to be printed, the parties hereto, in lieu of designating the pages and lines containing offers of exhibits, objections and arguments by counsel and rulings and statements by the Trial Examiner with respect thereto, shall set forth, at the appropriate place in the designation for printing, and in the printing thereof, a statement in the following form

"Commission's (or petitioners') exhibit was offered and received in evidence;

and the parties hereto shall not designate for printing objections and arguments by counsel with respect to the offer, admission or exclusion of oral testimony or any statements or rulings of the Trial Examiner with respect thereto except and unless the admission or rejection of the particular exhibit, exhibits or testimony is intended to be challenged or relied upon on review by the party making the designation.

4. That, in making their designation of the portions of the transcript to be printed, the petitioners need designate only those portions of the record upon which it intends to rely as being in support of its affirmative case and the respondent shall designate the evidence upon which it in-

tends to rely as supporting its Findings as to the Facts and Conclusion, and Order to Cease and Desist.

Printing

5. That, in printing the transcript of the designated portions of the record, all corrections to the transcript of the record which were duly approved by the Trial Examiner during the course of the hearing or which have been or may hereafter be agreed upon by counsel for the petitioners and counsel for the respondent, shall be made in the body of the printed record, and all designations of the record shall be deemed to incorporate the appropriate correction as though said correction had already been physically made in the transcript.

6. That in designating for printing portions of the testimony of any witness which was specifically adopted by another witness or by any petitioner during the course of the proceedings before the respondent such adoption shall be noted in the designation, or in the printing thereof, immediately following the adopted testimony by a statement in the following form:

"The foregoing testimony, beginning at page ....., line ....., and ending at page ....., line ....., was adopted by the following....."

7. That the following items need not be included as a part of the printed record on review even though they are designated by one of the parties hereto:

(a) The 130 page Certificate of Transcript filed by the Secretary of the Federal Trade Commission with the Clerk of the Seventh Circuit Court of Appeals.

(b) The opening statements by counsel for the petitioners and counsel for the respondents.

(c) The designations of the record to be printed.

(d) Any statement or argument by counsel for either the petitioners or the respondent, other than objections in the course of the proceedings below, or any remarks by the Trial Examiner other than rulings of the Examiner except and unless the statement, argument or remark is intended specifically to be relied upon by the party making the designation.

8. That, in printing the transcript of the record, petitioners, in lieu of printing the Commission's complaint and

each of their sixty respective answers thereto, may print a compilation of the complaint and the answers thereto arranged in the following form:

(a) A paragraph of the complaint;

(b) The answer of the petitioner, The Cement Institute, its officers and trustees, to that paragraph of the complaint;

(c) The form of answer to that paragraph of the complaint which was used by a substantial number of the petitioners with a list of the petitioners using that form of answer and footnoted to indicate any variations among said petitioners;

(d) Any other groups of similar answers by other petitioners;

(e) A list of the petitioners who did not answer the given paragraphs of the complaint; and

(f) The answers to that paragraph of the complaint of petitioners which because of their variations cannot be grouped, arranged in Alphabetical order;

or, in the alternative, that the Commission's complaint be set out separately and in full to be followed by a compilation of the answers to the various paragraphs of the complaint in the form provided for in sub-paragraphs (b) to (f) immediately preceding.

9. That, in printing the transcript of the record, the petitioners may narrate or summarize each of the following matters:

(a) The identification and description of the general experience of any witness;

(b) Testimony regarding the identification, organization and history of any of the petitioners and facts concerning petitioners' officers, location of plants, raw material deposits, and technical or statistical facts regarding mill capacity, production and shipments;

(c) Testimony concerning identification of exhibits including both direct and voir dire examination.

10. Within sixty days from the date of the filing with the Clerk of this Court of the last designation of portions of the transcript to be printed by any party, petitioners shall serve upon counsel for the respondent any and all

narrations or summarizations provided for in Paragraph 9 of this order and thereupon, within thirty days thereafter, the respondent may, if it so desires, serve upon attorneys for the petitioners a counter-narrative or summary of any narration or summarization of any part or parts of the transcript submitted by the petitioners containing and indicating thereon any changes by way of correction, deletion or addition desired by the respondent. Within fifteen days thereafter petitioners shall deposit with the Clerk of this Court for printing the narrations and summarizations of the part or parts of the transcript as provided herein for which no counter-narrations or summaries have been proposed by the respondent, and in all cases where a counter-narration or summary has been proposed by the respondent, petitioners shall have the election of depositing with the Clerk of this Court for printing, either the respective narrations or summarizations of the petitioners and the respondent to be printed side by side, or the narration served by the respondent, or direct the Clerk to print the original transcript of the narrated portions verbatim.

Adoption of documents filed in other causes

11. That any petitioner herein may, as a part of its Statement of Points, Designation of the Record to be printed, Motions for Leave to Adduce Additional Evidence, or Briefs, by specific reference to any particular part of the Statement of Points, Designations of the Record to be printed, Motions for Leave to Adduce Additional Evidence or Briefs filed on behalf of any other petitioner or petitioners, seeking review of the same order referred to above, incorporate, adopt and employ such parts with the same force and effect as though said petitioner had duly served and filed on its own behalf the part relied upon.

12. That any petitioner seeking review in the Seventh Circuit Court of Appeals from the Federal Trade Commission's order, entered July 17, 1943, in the Matter of The Cement Institute, Docket 3167, may avail itself of the provisions of this order to be entered by this Court with the same force and effect as though it were an original moving party, by signing and filing a statement of its intention to become a party hereto with the Clerk of this Court, and serving notice thereof on the Commission within thirty days after the Court has entered its order.

13. The Clerk of this Court shall return to the Secretary of the Respondent Commission the following exhibits:

Com. Exs.	343 A, B	411 A-G
	348 A, B	2720 (2)
	349 A-C	2720 (6)
	352 A-D	2720 (7)
	353 A-C	2720 (15)
	356	2720 (16)
	389 A-G	2720 (21)
	390 A-C	2720 (24)
	391 B-C	2720 (25)
	392 A, B	2720 (29)
	393	2720 (33)
	394 A, B	2762
	395	2826
	405 C, D, G, H	2827

2897

Resp. Ex. 2201 A-Z71

and upon their receipt, the Secretary of said Commission shall file with the Clerk of this Court, an amendment to the original certification of the record reflecting the withdrawal of said exhibits from the record filed in this Court; and for other and similar relief to shorten and simplify the record on review.

Dated: Washington, D. C.
December 24, 1943.

Donovan, Leisure, Newton & Lumbard,
By James R. Withrow, Jr.,
Member of the Firm,
Attorneys for all of the petitioners in the three causes Nos. 8360, 8361 and 8410.
Office & P. O. Address
No. 2 Wall Street
Borough of Manhattan
New York City, N. Y.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh District.

Aetna Portland Cement Co., et al., The Cement Institute, et al., Blaine S. Smith, et al., *Petitioners,* —against— Federal Trade Commission, *Respondent.*	Case Nos. 8360 8361 8410

United States of America,
District of Columbia. } ss:

James R. Withrow, Jr., being first duly sworn, deposes and says:

1. I am an attorney and counselor at law, duly admitted to practice in the courts of the State of New York, the federal courts situated therein, and the Supreme Court of the United States, and am a member of the firm of Donovan Leisure Newton & Lumbard, the attorneys for the petitioners in each of the three above entitled causes filed in this Court. Each of these petitioners seeks review from an order entered by the Federal Trade Commission (hereinafter referred to as the "Commission"), in a proceeding before it, entitled, "In the Matter of The Cement Institute, et al.; Docket No. 3167."

2. This affidavit is submitted in support of a Motion on behalf of the petitioners in the above entitled causes for an order permitting the petitioners to dispense with the printing of any of the exhibits certified by the Secretary of the Federal Trade Commission, for relief in connection with designating and printing the transcript of testimony and for other and further relief appropriate in the premises.

3. Counsel for the petitioners are submitting this motion in the interest of simplifying and reducing the size of the record to be printed in the above entitled causes, all of which petition for the review of an order entered by the Federal Trade Commission on July 17, 1943, in the Matter of The Cement Institute, et al., Docket 3167,

by confining the said printed record to matters regarded as absolutely necessary for the convenient presentation, consideration and disposition of the several petitions to review, and to eliminate unnecessary printing expense, use of critical materials and labor, and for other purposes which appear herein.

4. On July 17, 1943, the Commission entered several Orders in the said proceeding before it, one of which was an "Order to Cease and Desist," directed against these petitioners and certain producers of Portland cement. Said "Order to Cease and Desist" was accompanied by a compendium of "Findings as to the Facts and Conclusions," consisting of one hundred thirty-four printed pages, supported with references to the Transcript of the Record made by the Commission in the proceeding before it.

5. After these petitioners had duly filed their respective petitions to review, the Secretary of the Commission, on September 1, 1943, filed with the Clerk of this Court what it called a certified copy of the record, consisting of certain pleadings, orders and transcript of proceedings. The said record consists of more than 49,000 pages of transcript of testimony and 4800 exhibits, which have been estimated to contain between 50,000 and 100,000 pages.

6. Beginning in September 1943 and continuing into December 1943, I initiated and have personally conducted extensive negotiations with counsel for the respondent, the Federal Trade Commission, looking toward a reduction in the size of the record to be reviewed by this Court and in the size of the record to be printed. During the course of these negotiations I have proposed to counsel for the respondent numerous means for shortening the record and reducing portions of it for printing. These proposals have included substantially all of the matters referred to in the motion concerning which this affidavit is submitted.

7. From time to time during the negotiations respondent's counsel indicated that he had no objection, or no substantial objection in principle, to the relief requested in paragraphs 2, 3, 5, 7, 11 and 12 of this motion. Efforts to agree for the purpose of a stipulation, however, made it apparent that it was impossible to arrive either at language satisfactory to both parties covering all of the mat-

ters or to reconcile the divergent ideas as to the amount of time which the petitioners in other causes arising out of the same Federal Trade Commission order should be allowed in which to avail themselves of the privilege referred to in paragraph 12 of the motion.

8. Petitioners believe that all of the relief prayed for in this motion is not only desirable but necessary to serve the best interests of the Court and the parties to these several proceedings to the end that a workable record may be presented to the Court and used for the purposes of the review proceedings; and petitioners believe also that any further attempt to arrive at any agreement or stipulation between counsel for the petitioners and for the respondent to achieve the purposes sought will not only be fruitless but will unduly delay the determination of the several questions involved.

Physical Exhibits (Motion, Pars. 1 and 2).

9. I am personally familiar with the exhibits offered and received in evidence in said proceeding before a trial examiner appointed by the Commission. Said exhibits include a considerable amount of voluminous printed material, such as books, long and complicated tabulations of freight rates, pamphlets, a large number of invoices showing specific sales by some of these petitioners and by their competitors, charts, maps and tabulations, and numerous other documents which would be difficult and expensive to print.

10. I have investigated the cost of printing the exhibits in this proceeding, and, while the estimates vary as to the total cost, it appears that it would run in excess of $100,000 to print all of the exhibits.

11. I believe that printing the voluminous exhibits in this record will not serve the convenience of the Court or of the parties hereto to any substantial extent; that it will not serve to reduce to any easy manageable size the printed record on review; and that the expense and wastage of paper, lead and other materials vital to the war effort would not therefore be justified by any measurable benefits to be served by printing.

12. While counsel for the respondent originally agreed in principal with petitioners' proposal to dispense with

printing the exhibits, he subsequently has insisted upon reserving a right to designate "some" exhibits for printing. Since this would permit the designation of as many exhibits as counsel should determine upon it would not serve any useful purpose and would not afford any relief to petitioners.

13. Petitioners are ready and willing to assist the Clerk of this Court in arranging the physical exhibits in whatever manner will make them most conveniently available and accessible for the use of the Court, and of the parties to these causes.

14. It is not believed that the respondent will have any objection to paragraph 2 of the motion, the effect of which will be to eliminate numerous documents from the printed record which can be made available to the court in their original form.

Designation of Evidence (Motion Pars, 3 and 4).

15. Petitioners believe that the printed record for review before this Court can be considerably shortened by the elimination of many objections, statements and argument by counsel, and rulings and remarks of the Trial Examiner during the course of the proceedings conducted by the Trial Examiner with respect to the admission or exclusion of evidence and other matters. Accordingly, petitioners propose that all such matters shall be eliminated in the designation of the portions of the transcript to be printed and in the printing of the record, except and unless the party so designating such matters specifically intends to rely thereon in the proceedings before this Court. This will be accomplished by granting the relief sought in paragraph 3 of the motion.

16. Petitioners believe that a considerable portion of the Commission's Findings as to the Facts and Conclusion are not supported by any substantial competent evidence. Under such circumstances and in literal compliance with the rules of this Court it might, therefore, conceivably be incumbent upon petitioners to designate for printing all of the evidence the one hundred thousand page record in order to establish that there is "no" evidence to support a given finding.

17. On information and belief there are numerous parts of the record before the Commission which neither

the petitioners nor the respondent will deem necessary to be included in the printed record before this Court. Petitioners, however, have no way of knowing what parts of the record the respondent may deem material or important in order to support whatever position it may take. Accordingly, petitioners believe that the printed record can be shortened and the best interests of all the parties protected if petitioners be required to designate for printing only such parts of the testimony which they deem material and necessary to support their affirmative position with respect to the evidence before the Commission, and that they not be required to designate for printing the evidence which the respondent might conceivably suggest supports the findings. Petitioners request further that the respondent will be amply protected by the right it has to designate for printing such of the evidence as it deems material and which supports its findings as to the facts. This is the relief sought in paragraph 4 of the motion.

Printing (Motion Pars. 5-10).

18. During the course of the proceedings before the Trial Examiner extensive corrections to the transcript of testimony were ordered by the Examiner upon application of the respective parties. Upon information and belief these corrections, however, were not physically made in the typewritten transcript of testimony and many of them have not been made in the transcript of the record filed with this Court by the respondent. Petitioners believe that all corrections to the typewritten transcript of testimony which were ordered by the Trial Examiner or which may hereafter be agreed upon among the parties hereto should be reflected in the printed record before this Court. This is the relief sought in paragraph 5 of petitioners' motion.

19. During the course of the proceedings before the Trial Examiner and in an effort to expedite and shorten the record of the proceedings before the respondent some of the petitioners were urged by the Trial Examiner to adopt portions of the testimony of witnesses who had already appeared rather than to produce witnesses on their own behalf to give testimony to the same effect. This procedure was followed by some of the petitioners and stipulations adopting certain testimony by page and line

were filed and included in the transcript of record. Petitioners believe that the record before this Court will be more readily usable and clearer if in designating and printing portions of the record the specific adoption of testimony is noted in the designation and in the printing of the record immediately following the adopted testimony. This is the relief sought in paragraph 6 of the motion.

20. Petitioners believe that the printed record before this Court can be considerably shortened without prejudice to any party and without inconvenience to the Court if certain formal matters are eliminated from the printed record, to wit the following:

(a) The 130 page Certificate of Transcript filed by the Secretary of the Federal Trade Commission with the Clerk of the Seventh Circuit Court of Appeals.

(b) The opening statements by counsel for the petitioners and counsel for the respondents.

(c) The designations of the record to be printed.

(d) Any statement or argument by counsel for either the petitioners or the respondent, other than objections in the course of the proceedings below, or any remarks by the Trial Examiner other than rulings of the Examiner except and unless the statement, argument or remark is intended specifically to be relied upon by the party making the designation.

In the negotiations looking toward shortening of the record counsel for the respondent expressed agreement with the principle represented by the foregoing eliminations. This is the relief sought in paragraph 7 of the motion.

21. In response to the Complaint of the respondent each of the 75 corporate petitioners, with the exception of a few affiliated companies, and The Cement Institute filed separate Answers. Many of the answers, particularly those of the 59 petitioners in cause No. 8360, are substantially similar in form and content. Petitioners believe that a compilation of the complaint by paragraphs and the answers thereto whereby substantially similar answers are grouped will considerably shorten the printed record on review and will not prejudice any party or cause any inconvenience to this Court. This is the relief sought in Paragraph 8 of the motion.

22. Petitioners believe that because of the vast size of the transcript of testimony (49,000 pages) the con-

venience of the parties and the Court can be served by narrating or summarizing what might be termed the more formal and uncontrovertible matters. Petitioners, therefore, propose that leave be granted to narrate or summarize each of the following matters:

(a) The identification and description of the general experience of any witness;

(b) Testimony regarding the identification, organization and history of any of the petitioners and facts concerning petitioners' officers, location of plants, raw material deposits, and technical or statistical facts regarding mill capacity, production and shipments;

(c) Testimony concerning identification of exhibits including both direct and voir dire examination.

This proposal was made to counsel for the Commission in October and November of 1943 and was rejected. All efforts on the part of petitioners to arrive at a stipulation with the respondent looking toward the narration or summarization of any part of the record were resisted by counsel for the respondent. Petitioners believe that the proposed narration or summarization of purely formal matters will not and cannot prejudice the respondent and that such narration or summarization will considerably shorten and make more usable the extensive record in this case.

Adoption of Documents Filed in Other Causes.

23. In addition to the petitions for review filed by the petitioners on whose behalf this motion is made eight other petitions for review of the same order of the Federal Trade Commission have been filed by other corporations. Petitioners believe that a considerable amount of duplication of documents and needless repetition of statements can be avoided if any petitioner in any of the causes for review of the respondent's order now pending in this Court are permitted to incorporate by reference in its statement of points, designation of the record to be printed, motions for leave to adduce additional evidence, or briefs, specific portions of similar documents filed on behalf of any petitioner. This is the relief sought in paragraph 11 of the motion.

24. After the respondent filed its transcript of the record in this Court in September, 1943 petitioners ex-

amined the same for the purpose of determining whether or not a complete and correct transcript had been filed. Upon investigation it was discovered that a number of exhibits had been certified to this Court as part of the transcript of record which either had been stricken upon order of the Commission or which had been merely marked for identification but not offered or received in evidence. Steps were taken by petitioners by correspondence with the Commission to correct this situation.

Under date of December 11, 1943 the Secretary of the respondent filed with the Clerk of this Court copies of the foregoing correspondence regarding the errors in the transcript of record as filed with this Court and in conjunction therewith filed a "Memorandum for the Record: FTC Docket 3167 Cement Institute, et al." dated December 9, 1943 and signed by J. W. Karsner, Chief, Records Division, which indicates that a number of exhibits now filed in this Court as part of the transcript of the record are not properly a part of said record, to-wit the following:

Com. Exs.	343 A,B	411	A-G
	348 A,B	2720	(2)
	349 A-C	2720	(6)
	352 A-D	2720	(7)
	353 A-C	2720	(15)
	356	2720	(16)
	389 A-G	2720	(21)
	390 A-C	2720	(24)
	391 B-C	2720	(25)
	392 A,B	2720	(29)
	393	2720	(33)
	394 A,B	2762	
	395	2826	
	405 C,D,G,H,	2827	

2897

Resp. Ex. 2201 A-Z71

25. The foregoing correspondence and memorandum does not indicate that the respondent proposes to take any steps to withdraw said exhibits from the record before this Court and petitioners believe that the respondent, having conceded that the exhibits mentioned in the foregoing paragraph are not properly a part of the record before this Court, should withdraw said exhibits or, in the alternative, that the Clerk of this Court should return

said exhibits to the respondent and remove them from the files of this Court. This is the relief requested in paragraph 13 of the motion.

26. Petitioners believe that a considerable amount of time can be saved for this Court if the petitioners in the eight other causes arising out of the same order of the Commission now pending in this Court are permitted to obtain the benefits of any order entered on this motion without formally moving the Court for such relief and in lieu thereof signing and filing a statement of intention to become a party to the order with the Clerk of this Court on notice to the Commission. This is the relief requested in Paragraph 14 of the motion.

27. The making of the motion and the filing of this affidavit are not for the purpose of any delay in the final disposition of the three causes, and the granting of the motion in support of which this affidavit is filed will not result in any unreasonable delay.

James R. Withrow, Jr.

Subscribed and sworn to before me this 24th day of December, 1943.

Richard A. Mahar,
Notary Public.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

(Caption—8360-8361-8410)

ANSWER TO PETITIONERS' MOTION FOR SIMPLIFYING THE RECORD AND REDUCING THE PORTIONS WHICH HAVE TO BE PRINTED.

(Filed Dec. 29, 1943. Kenneth J. Carrick, Clerk.)

Comes now the Federal Trade Commission, Respondent herein, and by its counsel submits this its answer to the motion of Petitioners herein entitled "Motion for Simplifying the Record and Reducing the Portions which Have to be Printed". Said motion comprises thirteen paragraphs and is accompanied by the affidavit of Petitioners' counsel, James R. Withrow, Jr., comprising twenty-seven

paragraphs. This answer includes a statement in complete and unqualified opposition to only one paragraph of the motion. It includes a complete and unqualified assent to 7 paragraphs of the motion and a partial, qualified assent to 5 paragraphs of same.

The outstanding feature of the pending motion is embodied in Paragraph 1 thereof and it is to this paragraph that the Respondent is completely and unqualifiedly opposed. Such paragraph is outstanding in that it is intended to prevent the designation and printing of any and all exhibits. In Paragraph 2 of his affidavit Mr. Withrow states that the motion is "for an order permitting the petitioners to dispense with the printing of any of the exhibits certified by the Secretary of the Federal Trade Commission." The other features of the motion are incidental and most of them could have been stipulated between opposing counsel and were, in fact, largely agreed to as later shown.

The Motion to Dispense with Printing of all Exhibits.

The grounds on which Respondent opposes that part of Petitioners motion which seeks to dispense with the printing of any and all exhibits are as follows:

1. The exclusion of all exhibits from the printed record while printing all designated portions of the transcript of oral testimony would heavily and unfairly weight the printed record against Respondent and in favor of Petitioners.

It is to be noted that Petitioners are even willing to forego designation and printing of all exhibits offered by them in order to confine the printed record to the transcript of oral testimony. Petitioners expressly admit that they do not regard even their own exhibits as "absolutely necessary for the convenient presentation, consideration, and disposition of the several petitions to review". The purpose of the motion is stated to be that of "confining" the printed record to such matters. (Paragraph 3 of Counsel Withrow's affidavit). On the contrary, the Commission regards many of its exhibits as being "absolutely necessary" for the support of its findings as to the facts and of its order to cease and desist. Most of the findings and conclusions of the Commission are based primarily upon the evidence contained in the exhibits and the transcript

of oral testimony on which it would rely is largely supplementary and explanatory of the documentary evidence. By sharp contrast most of Petitioners' reliance is upon the oral testimony of interested parties connected with Petitioners. Such testimony is at variance with Petitioners' own writings in ordinary course of business while carrying out the price-fixing conspiracy that the Commission has found to exist. Such writings loom large among the exhibits that would not be printed if Petitioners' motion should prevail. Moreover, as contended by counsel for the Commission before the Trial Examiner, the exhibits put in evidence by Petitioners are very largely irrelevant and immaterial on the main issues and unnecessarily cumulative on collateral matters in the case and are therefore very largely valueless, even to Petitioners. Petitioners have now confirmed that contention by their admission that none of their exhibits is important enough to warrant printing (Paragraph 3 of Counsel Withrow's affidavit). Since much of the oral testimony on which Respondent relies is built upon and around the exhibits, there would be no object in designating such testimony for printing unless the exhibits to which it relates are also printed. This would operate to weight still further the printed record in favor of Petitioners.

Therefore, unless the self-serving oral testimony of Petitioners in their own behalf is to be given a preferred status to that of their own conflicting written statements made when there was decidely less motive to color and deceive, such writings must not be excluded from that convenient consideration in his chambers by each member of the Court which printing serves so well.

2. Besides conflicting with the express rules of the Court applicable to special proceedings such as this, the exclusion of all exhibits from the printed record would not serve the convenience of this Court but would adversely affect it.

Under Rule 36(5) of the rules of this Court relating to Special Proceedings, provision is made for the printing of such portions of the transcript as may be designated for that purpose by the opposing parties. The word "transcipt" as used in this rule obviously is intended to include exhibits and not merely the transcript of oral testimony. The rules relating to Special Proceedings make no provision for any narration of the record. The rules for desig-

nation by opposing parties of the portions of the record to be printed in cases involving review of orders of administrative agencies, such as the Federal Trade Commission, were adopted by this Court following the opinion of the Supreme Court in N. R. L. B. *vs.* Foote Bros. Gear and Machine Corporation, 311 U. S. 620 (1940); 121 Fed. 2d. 802 (1941). The language of the statute upon which the Supreme Court based its remand in that case is the same as that of the Federal Trade Commission Act. The effect of Petitioners' motion to exclude all exhibits from printing would be to exclude from the printed record the most vital parts on which the Commission relies without even proposing a narration of such parts and which latter the Supreme Court held would be an inadequate substitute.

The Circuit Court of Appeals for the Second Circuit had previously held that it could not order less than the whole transcript to be printed if either party objected on the ground that a consideration of the whole record was necessary to a decision of the case. Federal Trade Commission *vs.* Inecto, Inc., 70 Fed. 2d 370 (1934). The respondent in that case contended that it was necessary to examine the entire record to support its view that there had been no violation of the Commission's order. The Court held that it could do this only if the entire record were before it in printed form as required by the Court's rules.

In Paragraph 16 of Mr. Withrow's affidavit he concedes that "in literal compliance" with the rules of this Court it might "conceivably be incumbent upon petitioners to designate for printing all of the evidence in the one hundred thousand page record in order to establish that there is 'no' evidence to support a given finding"; this in view of their position that "a considerable portion" of the findings of fact and conclusion "are not supported by any substantial competent evidence." That was the situation in the Inecto case and the court's reaction to it was that the entire record must be printed because only an examination of the entire record could resolve the issue posed by the respondent there. While counsel for the Commission have no thought of pressing for such a conclusion here, it does pose a logical dilemma for petitioners. Petitioners here would escape that dilemma by the easy expedient of printing what they desire and preventing the printing of

what the Commission desires. It is gratifying, however, to see that Mr. Withrow has some inkling of the law concerning the limited scope of factual review provided by the statute and which was not evident in the prayer of Petitioners' petitions.

By contrast with the Inecto case, in the present cases we have the anomaly of Petitioners urging in their petitions that the Court review "the entire record in this proceeding, including all the evidence taken", etc. and yet seeking to prevent the printing of those portions of such record and such evidence on which the respondent primarily relies. This latter is done on the shallow pretext of serving the convenience of the Court.

The obvious purpose and effect of Petitioners' motion are to promote the most favorable presentation and consideration of their case and not to promote the convenience of the Court as claimed. Petitioners propose that the portions of the typewritten transcript of oral testimony on which opposing counsel rely shall be designated and printed but that no exhibits shall be printed. This means that the portions of the record that are already easiest to read becaues of color, spacing, etc. should be printed while the portions that are now most difficult to read, being largely in photostatic form, should be left in that form. Their motion would require each member of the Court to visit the clerk's office to read and study the single photostatic copy there filed, some of these being dim and difficult to read. Moreover, there are more copies available of the typewritten transcript than of exhibits. So far as the convenience of the Court is concerned, it would be better to print the necessary exhibits and omit printing all oral testimony, though of course counsel for the Commission do not so propose. On all logical and legal grounds, however, they would have just as much right and reason to make a motion to that effect as Petitioners have to make their pending motion. They might say with the same lame and limping logic which petitioners employ in Paragraph 12 of Counsel Withrow's affidavit that it "would not serve any useful purpose" to designate and print the huge amounts of self-serving testimony contained in the transcript of oral testimony and that the Court should, therefore, order only the designated exhibits to be printed.

Aside from the greater ease of reading the unprinted

transcript of oral testimony than the unprinted exhibits yet to be designated, there is the element of comparative bulk. According to Paragraph 5 of Counsel Withrow's affidavit there are 49,000 pages of transcript and an estimated 50,000 to 100,000 pages of exhibits. Of these 49,000 pages, over 26,000 pages were devoted to the presentation of Petitioners' case. It is to be assumed that Petitioners will designate for printing the greater part of their direct testimony and that counsel for the Commission will counter designate the greater part of the cross examination of Petitioners' witnesses. It is safe to say that in all probability the percentage of transcript pages of oral testimony that Petitioners would want printed is substantially greater than the percentage of exhibit pages that Respondent would designate for printing. So the normal expectation would be one of comparatively little saving in the printing of the designated parts of the oral transcript. Since Petitioners have already admitted that none of their own exhibits is important enough to print, this would dispense with the printing of their more than 3600 exhibits and the many thousands of pages of such exhibits.

So far as oral testimony offered by counsel for the Commission is concerned, only about 50 percent of the 22,000 pages of transcript technically chargeable against them consists of testimonial matter and the direct testimony was less than one-third of that total. Presumably neither side would care to designate or to have printed much of this non-testimonial matter.

Petitioners imply that there is danger that counsel for the Commission would require the printing of all exhibits offered in support of the complaint, referring in that connection to "voluminous printed material, such as books, long and complicated tabulations of freight rates, pamphlets, a large number of invoices showing specific sales by some of these petitioners and by their competitors, charts, maps and tabulations, and numerous other documents which would be difficult and expensive to print" (Paragraph 9 of Counsel Withrow's affidavit). This is immediately followed by an estimate that it would cost over $100,000 to "print all of the exhibits" (Ibid. paragraph 10). This superficially impressive argument based upon the printing of all exhibits is shattered by Petitioners' own recognition that it is without foundation. In paragraph 17

of the Withrow affidavit it is correctly stated that "there are numerous parts of the record before the Commission which neither the petitioners nor the respondent will deem necessary to be included in the printed record before this Court." Nevertheless the argument as to printing *all* exhibits made in Paragraphs 9 and 10 of the affidavit was carried over into Paragraph 11 and the conclusion drawn that "printing the voluminous exhibits in this record will not serve the convenience of the Court" or parties and that the wastage of materials "vital to the war effort" would not be "justified by any measurable benefits to be served by printing."

The effect of such statements as those above quoted from Paragraphs 9, 10, and 11 of the affidavit is to misrepresent the position of counsel for the Commission. That they do misrepresent it is shown by the above quotation from Paragraph 17 of the Withrow affidavit. Counsel for the Commission have never considered it a reasonable possibility that all exhibits would be printed and particularly not such as books, freight rate compilations and invoices. No attempt was made by petitioners to reach an agreement with counsel for the Commission that particular exhibits or particular classes of exhibits should or should not be printed. During the hearings before the Trial Examiner counsel for the Commission made every effort to avoid the introduction of bulky exhibits and to substitute therefor summarizations but Petitioners resisted such effort with such success that a very large part of the exhibit record that they now say is not worth printing is there because of their insistence. This is particularly true with regard to bulky original bids and invoices which Petitioners insisted be introduced into the record in lieu of the tabulations and other summarizations which counsel for the Commission desired to substitute therefor. It is a far cry from the printing of certain exhibits containing written admissions of Petitioners antedating the taking of testimony to Petitioners' pretended fear that counsel for respondent will designate for printing all exhibits, including all those that Petitioners themselves offered and now concede are not worth printing as well as those which Petitioners succeeded in requiring counsel for Respondent to offer unwillingly. Counsel for the Commission, however, have taken the position that in the absence of a Statement of Points

which shows the errors asserted and intended to be urged by Petitioners there can be no intelligent designation by either side of the portions of the record to be printed.

So far as the convenience of members of this Court is concerned, the omission from the printed record of such exhibits as those on which the Commission primarily relies would operate simply to throw on the Commission the unwarranted burden and expense of reproducing sufficient copies and put the respective members of the Court to the inconvenience of considering such reproduced exhibits in a form probably less satisfactory than printing.

3. The granting of Petitioners' motion to dispense with the printing of any and all exhibits would greatly complicate the handling of the case on review by the Supreme Court.

Regardless of the outcome of this case in the Circuit Court of Appeals it may be taken for granted that the losing party will apply to the Supreme Court for a review on writ of certiorari as provided for by the Federal Trade Commission Act. The Supreme Court will doubtless insist upon the printing of those portions of the record which are printable and upon which the opposing parties rely, as the rules of that Court require the filing of 40 printed copies of the record on which the parties rely. Under Rule 13 of the Rules of the Supreme Court, the parts of the record designated and relied on by the opposing parties must be printed and "if at the hearing it shall appear that any material part of the record has not been printed the appeal may be dismissed or such other order made as the circumstances may appear to the Court to require". (U. S. Supreme Court Digest, Vol. 11, pp. 14, 15.)

In the event that the Circuit Court of Appeals should grant Petitioners' motion and later decide the merits of the case adversely to the Commission, there would be no printed version of the exhibit record on which the Commission chiefly relies but only a printed version of an oral transcript heavily weighted with Petitioners' side of the case. The Commission would then be confronted with the necessity of complying as best it could with the requirement that 40 printed copies of the record on which it relies be filed with the Supreme Court. At best this would result in relieving Petitioners of an expense that is properly

theirs and transferring it to the shoulders of the Commission. At worst it would so unfairly prejudice the Commission's rights before that Court as to threaten dismissal under Rule 13 previously quoted.

Such were the considerations that caused counsel for the Commission to recede from an ultra-liberal expression of willingness to treat all exhibits as physical exhibits as stated in Paragraph 12 of Counsel Withrow's affidavit. In that same paragraph he states that we now insist upon the right to designate "some" exhibits for printing and that since this "would permit the designation of as many exhibits as counsel should determine upon it would not serve any useful purpose and would not afford any relief to Petitioners" That is equivalent to saying that it serves no useful purpose to have before the Court in printed form those portions of the record on which the Commission chiefly relies but that it serves a very useful purpose to print the portions on which Petitioners chiefly rely. That is the sort of "relief" which he says should be afforded Petitioners.

4. The motion to exclude all exhibits from printing is at odds with the scope of the judicial review requested by Petitioners in their petitions.

In their petitions Petitioners pray the Court to "review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and their co-respondents in the course of the proceeding before the trial examiner, the trial examiner's report upon the evidence, the exceptions filed thereto by and on behalf of your petitioners and their co-respondents, the several motions made on behalf of petitioners and their co-respondents before the Commission, and the rulings thereon by the Commission", etc.

Respondent has on several occasions pointed out to the Court that such an unlimited factual review as that requested by Petitioners is not provided for by the statute, that the Commission's findings of fact if supported by substantial competent evidence are made conclusive by the statute and that Petitioners should therefore be required to address themselves specifically to the findings they claim are not supported by such evidence. Petitioners have, nevertheless, been partially relieved by the Court's order of December 15, 1943 from the requirements of Rule

9 that there be filed a "Statement of Points which shall set out separately and particularly each error asserted and intended to be urged". After having obtained that and other forms of relief consistent with the unlimited scope of factual review prayed for in their petitions, Petitioners now seek by their pending motion to limit the effective consideration of "the entire record, including all the evidence taken" that they prayed to have reviewed. By seeking to limit effective consideration in printed form of the portions of the record on which Respondent chiefly relies and by foregoing similar consideration of their own exhibits, Petitioners now show symptoms of a distinct allergy to that unlimited factual review on which their previous appellate strategy has been based. What Petitioners will do as to designating their own exhibits for printing if and when they are again confronted with that now undesired opportunity, remains to be seen. There is far too much at stake in this case to cause Petitioners to hesitate even slightly over the cost of printing everything they really think would promote effective judicial consideration of all their contentions.

The Motion for Other Relief.

Respondent's general position here is that all portions of Petitioners' motion other than that seeking to exclude all exhibits from printing are either completely or qualifiedly assented to.

As stated at the outset, most of these other portions of the motion could have easily been stipulated between the parties and were, in fact, agreed to. Petitioners having seen fit to seek a Court order on these matters, counsel for the Respondent are glad to assent thereto by the exact extent to which they advised petitioners of their willingness to stipulate. There are some matters, however, as to which the assent must be qualified. This calls for a separate statement regarding each paragraph of the motion subsequent to Paragraph 1 and regarding the pertinent paragraphs of Counsel Withrow's affidavit.

Referring to Paragraph 2 of the motion, the only part counsel for Respondent were not willing to stipulate was that the "statement of contentions filed with the trial

examiner" should be submitted to the Court in either original or printed form. They objected that such contentions are not properly a part of the record on review, but offered to stipulate their submission subject to such objection. Such "contentions" are the equivalent of the "request for proposed findings of fact" which this Court has held is not a part of the record to be included in the transcript of record on review. Q.R.S. Music Company *vs.* Federal Trade Commission, 1 Stat. & Dec. 719 (C.C.A. 7, 1924). Without receding from that position, however, counsel for the Commission will assent to this paragraph of the motion on condition that similar treatment be given by the Court to the Statements of Contentions filed with the Trial Examiner or filed with the Commission in briefs by counsel for the Commission.

Referring to Paragraph 3 of the motion, counsel for the Commission assent to it without qualification and cannot understand why Petitioners should suggest it as one of the things that could not be stipulated as they do in Paragraph 7 of Counsel Withrow's affidavit.

Referring to Paragraph 4 of the motion, counsel for the Commission assent to it conditionally. On its face this paragraph does no more than restate subparagraph 5 of Rule 36 of this Court appearing under Title V, Special Proceedings, and so would not appear to call for any special order of the Court such as Petitioners seek. Nevertheless, this paragraph of the motion actually uses the word transcript as it appears in the rule to exclude the exhibit record, whereas it is obviously intended to include it. This paragraph of the motion obviously relates only to the transcript of oral testimony and excludes exhibits in harmony with Paragraph 1 of the motion, although use of the words "record" and "evidence" as the equivalent of "transcript" would permit a contrary conclusion were Paragraph 1 ignored.

Respondent desires and urges a full compliance with the rule regarding designation and counter designation of the record to be printed. It objects to the partial, inadequate, and unfair compliance proposed by Petitioners when their Paragraphs 1 and 4 are read together. For that reason alone does Respondent feel the need of qualifying its assent to Paragraph 4. Under such circumstances the as-

sertion of Mr. Withrow in Paragraph 17 of his affidavit that "Respondent will be amply protected by the right it has to designate for printing such of the evidence as it deems material and which supports its finding as to the facts" and that "this is the relief sought in Paragraph 4 of the motion" is disingenuous, to say the least. Like Paragraph 4 itself, the argument in Paragraph 17 of the affidavit is on its face nothing but an argument for a compliance with Rule 36(5) of the Rules of the Court. Inserted in it, however, is the non sequitur that since Petitioners have no way of knowing what parts of the record we may deem material or important they should "not be required to designate for printing the evidence which the respondent might conceivably suggest supports the finding". Since no one proposes any such ridiculous requirement, the argument in this respect is only befuddled and befuddling. We might just as logically propose that since we have no way of knowing what parts of the record Petitioners may deem important, we should "not be required to designate for printing" the evidence that they might "conceivably" want to rely on. Full compliance with Rule 36(5), with each side making its own designations, is all that is necessary.

Referring to Paragraph 5 of the motion, counsel for Respondent unqualifiedly assent thereto. They take exception, however, to the statement in Paragraph 7 of Counsel Withrow's affidavit that there was ever any opposition to stipulating either the form or substance of what is now Paragraph 5. Some of the mechanical difficulties may have been pointed out in the course of the negotiations.

Referring to Paragraph 6 of the motion, counsel for the Respondent assent thereto without qualification and state that they would have readily stipulated to the same effect had such a proposal ever been made by Petitioners. It is exactly in keeping with the policy which counsel for Respondent repeatedly urged upon Petitioners in hearings before the Trial Examiner. Mr. Withrow in Paragraph 19 of his affidavit credits the Trial Examiner with having urged this procedure but is apparently unwilling to give due credit to counsel for the Commission for having urged it upon the Trial Examiner and upon Petitioners.

Referring to Paragraph 7 of the motion, counsel for Respondent assent to Paragraphs 7(a), (b) and (d) there-

of, and have stood ready to stipulate the substance of such paragraphs. Despite the statement in Paragraph 7 of the Withrow affidavit, they are aware of no difference of opinion sufficient to have caused failure of the stipulation regarding such paragraphs. Agreement was reached that would have provided for printing the 130-page certificate of transcript only in the event that its sufficiency or the integrity of the record as certified should be challenged. Such a condition should still be attached to Paragraph 7(a) of the motion if granted. As to Paragraph 7(c), it should be noted that it seems to provide for setting aside Rule 5(d) of the rules of this Court with regard to Special Proceedings. That rule specifically provides that the designation of the record to be printed shall also be printed. Unless this were done Respondent would be deprived of a proper showing in the Supreme Court of what portions of the record it had designated for printing in the event that the printing of such portions is refused in accordance with Paragraph 1 of Petitioners' motion. Attention is also called to the form of the preamble to Paragraph 7 of the motion as reflecting an intent to set aside pro tanto the rule concerning designation and counter designation.

Referring to Paragraph 8 of the motion, counsel for Respondent assent thereto without qualification. They are aware of no circumstances that would have prevented a stipulation to the same effect.

Referring to Paragraph 9 of the motion, counsel for Respondent assent thereto without qualification and state that they had agreed to stipulate to a similar effect with Petitioners. It is exactly the policy urged upon Petitioners by counsel for the Commission in hearings before the Trial Examiner and which was long resisted there by Petitioners. The statement in Paragraph 22 of Counsel Withrow's affidavit that such a stipulation was rejected is erroneous. He has confused it with our position regarding the procedure for handling such narrations as this paragraph of the motion relates to. This will be more fully dealt with in comment on Paragraph 10 of the motion. Regardless of such error in the affidavit, it was made the occasion for the gratuitous statement that "all efforts on the part of petitioners to arrive at a stipulation with the respondent looking toward the narration or summarization of any part of the record were resisted by counsel for the

respondent." (Underscoring added.) Counsel for the Respondent have resisted only those efforts of Petitioners that were designed to substitute a futile attempt to agree on a narration or summarization of matters of substance in lieu of the designation and counter designation of the record provided for by Rule 36(5) of the Rules of this Court. Evidently Petitioners think even such resistance based on such grounds is subject to criticism.

Referring to Paragraph 10 of the motion, counsel for Respondent assent thereto without qualification. As now phrased, however, it differs materially from the stipulation proposed by Petitioners in that provision is now made for a counter narrative or summary by Respondent rather than trying to agree upon such a narrative or summary and fixing time limits for concluding such an agreement. Commission's counsel did not wish to assume any responsibility for delay or failure in reaching such an agreement. This is the only ground on which Petitioners could claim there was any resistance to their proposal to narrate the matters covered by Paragraph 9 of the motion. We concur in Mr. Withrow's statement (affidavit Paragraph 22) that "such narration or summarization will considerably shorten and make more useable the extensive record in this case". That was our position when the record was being made before the Trial Examiner and it was only then that Petitioners' position was ever in conflict with ours on this particular matter.

Referring to Paragraph 11 of the motion, counsel for Respondent assent thereto without qualification and state that this was readily agreed to by them in negotiations with Petitioners for a stipulation. Counsel for Respondent assert that there is no foundation for the assertion in Paragraph 7 of Mr. Withrow's affidavit that there was ever any difficulty in reaching an agreement on this particular subject.

Referring to Paragraph 12 of the motion, counsel for Respondent assent thereto with the qualification that the 30-day period provided for is unnecessarily long in view of the previous negotiations on the matter. There has never been any reluctance to stipulate the substance of this paragraph. Even Petitioners once agreed to a 10-day limitation after approval of the stipulation by the Court. We consistently took the position that since all Petitioners

were being kept advised of the negotiations regarding the proposed stipulations, there was no logical reason for any lengthy period in which to express their formal adherence. This is the divergence of ideas that Mr. Withrow refers to at the close of Paragraph 7 of his affidavit.

Referring to Paragraph 13 of the motion, counsel for Respondent offer no objection to the proposed return to the Commission of the 21 numbered exhibits listed therein. No one, however, could be prejudiced by their physical retention in the record in view of the fact that they could not, under the circumstances, be designated for printing or otherwise relied on by either party. Petitioners further request, however, that upon the return of such exhibits "the Secretary of said Commission shall file with the Clerk of this Court an amendment to the original certification of the record reflecting the withdrawal of said exhibits from the record filed in this Court". If this is desired by Petitioners merely as a formal closing of the matter, Counsel for the Commission would have no objection. But if Petitioners should take such amended certification as the basis for a contention that their 200-day extensions now running from the date of original certification on September 1, 1943 should begin to run anew from the date of the amended certification, counsel for the Commission would strongly object to the granting of this part of Paragraph 13 of the motion and to the opportunity for further delay that Petitioners would thereby be given. Unless some such move is contemplated by Petitioners there is no object in having any amended certification, for the Court's order that these 21 out of 4800 exhibits be removed from the record would answer every legitimate purpose without affecting the original certification or the 200-day period running therefrom.

Conclusion.

Counsel for the Commission resent and repel the obvious attempt of Petitioners by this motion to place upon their adversaries the onus of unreasonably refusing to shorten the record for printing and at the same time to escape the onus that is theirs of having stuffed the record with exhibits that they, as well as their adversaries, do not think worth printing. Most of all, however, this at-

tempt to cripple their adversaries by depriving them of effective use of the exhibits on which they chiefly rely while preserving to Petitioners the most effective use of their own self-serving testimony shown by the record to have been studiously prepared and rehearsed in written form, is resented and repelled as utterly lacking in elemental fairness.

In view of the basic importance of the matters raised in Petitioners' pending motion, counsel for the Commission respectfully request the Court to permit oral argument pro and con on the motion. Since counsel for the Commission will be before the Court on January 20, 1944 in connection with final argument in Case No. 8116, Corn Products Refining Company, et al. *vs.* Federal Trade Commission, it is suggested that some date be fixed for argument on this motion that will permit both matters to be handled on the same trip.

In any event, however, counsel for the Commission submit that for the reasons stated in the foregoing the motion of Petitioners to dispense with the printing of any and all exhibits should be summarily denied. They further submit that for reasons also stated in the foregoing the motion for other forms of relief, if granted, should not be allowed beyond the extent of respondent's acceptance thereof.

Respectfully submitted,
Federal Trade Commission,
By: W. T. Kelley,
Chief Counsel,
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.,
January 4, 1944.

Filed Jan 6-1944. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

• • (Caption—8360-8361-8410) • •

STATEMENT ON BEHALF OF PETITIONERS IN RESPONSE TO RESPONDENT'S ANSWER TO PETITIONERS' MOTION FOR SIMPLIFYING THE RECORD AND REDUCING THE PORTIONS WHICH HAVE TO BE PRINTED.

Come now the petitioners herein and by their counsel submit this statement in response to the statement submitted by the respondent Federal Trade Commission in partial opposition to petitioners' motion to simplify the record in the above entitled causes and to reduce the portions thereof which have to be printed:

The respondent in its statement consents to the entry of the order requested by petitioners in the motion referred to with respect to paragraphs 3, 5, 6, 7 (b) (d), 8, 9, 10, and 11. This statement, therefore, will be addressed to the respondent's "unqualified opposition" to paragraph 1 of the motion and its partial opposition to paragraphs 2, 4, 7 (a) and (c), 12 and 13. No reply affidavit has been submitted by the respondent. Accordingly no issue is raised as to the facts set forth in petitioners' affidavit in support of their motion.

A. The Submission to the Court of Exhibits in Their Original Form in Lieu of Printing (Motion Par. I; Resp. Stat. PP. 1-8):

The Commission opposes petitioners' motion in so far as it requests an order permitting all of the original exhibits to be presented to the Court in lieu of printing said exhibits on the following grounds:

1. That the exclusion of all exhibits from the printed record while at the same time printing designated portions of the transcript of testimony would "heavily and unfairly weight the printed record against respondent and in favor of petitioners";

2. That such exclusion of exhibits from the printed record conflicts with "the express rules of the Court ap-

plicable to special proceedings such as this" and will not serve but will adversely affect the convenience of this Court; and

3. That the granting of the motion in this respect "would greatly complicate the handling of the case on review by the Supreme Court".

It appears from the exhaustive discussion devoted by Commission counsel to the propriety of the relief requested that he has misinterpreted or misunderstood its purpose and effect. Petitioners have nowhere suggested, as is claimed by Commission counsel, that they do not regard "their own exhibits" (or for that matter the exhibits introduced in evidence by the Commission) as "unnecessary" or unimportant for the purposes of these review proceedings. On the contrary, petitioners believe that a discussion of the exhibits introduced by the Commission, as well as the exhibits offered by the respondent and received or rejected, as the case may be, will play an important part in the presentation of the matter to this Court. Moreover, petitioners have not suggested, as counsel for the Commission indicate, by reference to National Labor Relations Board v. Foote Bros. Gear & Machine Corporation, 311 U. S. 620 (1940); 121 F. (2d) 802 (C. C. A. 7th, 1941), that the exhibits, or any part of them are not to be before this Court for the purposes of the review proceeding. Again, on the contrary, petitioners have requested in their motion that the original exhibits:

"shall be physical exhibits, and that as such they shall constitute for all purposes a part of . . . the record on review"

and that they

"shall be stored by the clerk of this Court . . . in such manner as he may deem reasonably appropriate for their presentation and so that they will be available at all reasonable times to the parties and to the Court for inspection and examination during the pendency of these causes in this Court".

The Foote Bros. case supra stands for the proposition that the actual record of the proceedings before the administrative body must provide the basis for the judgment of the reviewing Court and, obviously, does not stand for nor suggest the proposition that it is improper for the Court to depend upon the original documents in

lieu of printed copies of such documents. In fact, it is common knowledge that in cases where exhibits are numerous and voluminous, as they are here, it is a common practice for appellate courts to grant permission to dispense with the necessity for printing.

1. The Alleged Prejudice to the Respondent:

We take sharp issue with the Commission's statement that the reliance of petitioners is solely or even largely upon "the oral testimony of interested parties" in alleged contrast to reliance of the Commission "primarily upon . . . exhibits". Petitioners assert that they deem the exhibits offered on their behalf to be of equal, if not of greater importance to the Commission's exhibits, in the review to be had herein of the proceedings before the Commission.

The fact that the Commission intends to rely largely on the exhibits suggests at least the probability that a substantial number of the 3,363 Commission's exhibits (totalling over 40,000 pages) would be designated for printing by the Commission; certainly, if printing were required, each of the more than sixty petitioners would designate substantially all, if not all, of the exhibits received on its behalf—a total of 3,790 for all petitioners. It is the tremendous expense and waste of vital war material which would necessarily be incurred in such printing which petitioners seek to avoid. Petitioners do not concede that there is any magic in the printed page and that, therefore, more attention or more weight will be given by this Court to the printed record of the testimony than will be given to the actual original exhibits which may be urged as supporting the position of either the petitioners or the respondent. (Such printing as may be essential for purposes of emphasis in support of the respective positions of the parties can, of course, be done in an appendix to briefs, a contingency provided for in National Labor Relations Board Cases by this Court in its Rules, Rule 35, and subd. 4, more fully discussed below).

2. The Alleged Conflict With the Rules of This Court and the Effect Upon the Convenience of This Court:

A re-examination of Rule 36, subdivision 5, of the rules of this Court does not reveal any conflict between the

relief sought in petitioners' motion and the aforesaid rules. Even were there any conflict, petitioners submit that this Court having control of its own rules may modify or amend them or grant relief from their application to suit the convenience of the Court and the parties in a given case and if, and to the extent that, any such modification or relief be required for the instant proceeding, petitioners hereby respectively request that such modification or relief be ordered.

Petitioners have noted that Rule 35, subdivision 4, of the rules of this Court which applies to the Review of Enforcement of Orders of the National Labor Relations Board provides for dispensing with "the printing of a composite separate record" and that "unless otherwise ordered by the Court the record shall be printed by counsel in an appendix or supplement to the briefs." We take it that this rule, which we understand to be more recent than Rule 36, is calculated to serve the convenience of the Court and more nearly expresses the attitude of this Court with respect to records transmitted by administrative tribunals as distinguished from records transmitted or perfected before this Court arising out of judicial proceedings. We submit that the alleged prejudice to the Commission could, upon application to this Court, be overcome in the manner suggested in Rule 35, subdivision 4, by printing as an appendix to its brief any and all of the exhibits which it contends support its findings which by reason of their "color, spacing, etc. . . . are now most difficult to read".

3. The Alleged Complications Which May Develop in Presenting the Case on Review to the Supreme Court of the United States.

A re-examination of the rules of the Supreme Court of the United States adopted February 13, 1939, in the light of the difficulties which the respondent suggests might arise on review proceedings before that Court, indicates that the respondent's fears in this respect are wholly unjustified.

We submit on the authority of the former Clerk of the United States Supreme Court and the Rules themselves, that Rule 13, section 9, cited by Commission Counsel has no application to procedure upon writs of cer-

tiorari. Mr. Reynolds Robertson, in his work on Practice and Procedure in the Supreme Court of the United States (Rev. Ed. 1929) states:

"e. Paragraph 9 of Rule 13, does not apply to printing of records on petition for certiorari, Paragraph 9, of Rule 13 . . . does not, by its terms, apply to cases on petition for, or on writ of, certiorari . . ." (p. 39)

The procedure with respect to certiorari from United States Circuit Court of Appeals is set forth in Rule 38 of the Rules of the United States Supreme Court. So far as pertinent that rule provides:

"1. A petition for review on writ of certiorari of a decision of, . . . a circuit court of appeals, . . . shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule."

• • • • •

"7. Upon receipt of the certified transcript of the record the clerk shall make an estimate of the cost of printing the record, and shall furnish the same to the party docketing the case. Upon payment of the amount estimated by the clerk, forty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. But where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there." (306 U. S. 719)

It is apparent on the face of Rule 38, paragraph 7, that the Supreme Court contemplated the receipt of a transcript, no part of which has been reduced to print, and that in such cases the Clerk of that Court shall do the printing. Obviously if only a portion of the record were printed below, the clerk would print such additional matter as is necessary to the review. And the fact that "original" exhibits not printed below may be printed before the Supreme Court if desired, but that this may not be required, is plain from the following statement by Mr. Robertson (op. cit., supra, p. 41):

"7. Original exhibits.—Original exhibits filed in the state court or in the lower federal court may be certified to the Supreme Court of the United States and filed

in the case in that court. Unless specially requested by counsel, original exhibits so certified are not printed by the Clerk with the certified record (which is sent up as an exhibit to the petition for a writ of certiorari), but are merely filed in the Clerk's office in their original form. If filed, they may be referred to in the briefs of counsel, and will be available for the use of the Court or any Justice thereof who may desire to inspect them.

"These original exhibits should not be bound up with the record sent to the Supreme Court, but should be certified separately, as 'Original Exhibits'."

There is, therefore, no foundation whatever for the Commission's statement, based upon Rule 13, that if the exhibits are not now printed in this Court there might be a threat of dismissal of certiorari.

B. The Opposition to the Relief Requested in Paragraphs 2, 4, 7(a), (c) and 13.

1. The Qualified Opposition to Dispensing With the Printing of the "Statements of Contentions" of the Parties (Motion Par. 2; Resp. State. P. 8):

Petitioners cannot accept the proposed amendment suggested by Commission counsel to paragraph 2 of the motion. This paragraph was intended to refer to and refers to the "Statements of Contentions" filed by either the petitioners or by the respondent pursuant to Rule XXII of the Rules of Practice of the Federal Trade Commission. It requests leave to submit them to this Court in their original form without being printed. The qualification imposed upon this paragraph of the motion by Commission counsel is that respondent shall also have the right to submit to the Court in its original form "the Statement of Contentions filed . . . with the Commission in briefs by counsel for the Commission." Petitioners know of no "Statements of Contentions . . . filed with the Commission in briefs" except two volumes of single spaced mimeographed material which constituted the Commission's argument on the facts in its brief. Needless to say, the briefs submitted before the Commission do not properly constitute any part of the record for review before this Court. The Statements of Contentions filed pursuant to Rule XXII, however, are in a different category since they

are filed for the consideration of the Trial Examiner in writing his Report upon the Evidence. The Trial Examiner's Report and the Exceptions filed thereto are a part of the record certified to this Court by the Commission in this case and properly so. Q. R. S. Music Company v. Federal Trade Commission, Stats. & Dec. 710 (C.C.A. 7th 1924), cited by the Commission, is of course out of point since the Rules of the Federal Trade Commission were amended in 1938 to remove the provision that the Trial Examiner's Report shall not be a part of the record. (Cf. Kidder Oil Co. v. Federal Trade Commission, 117 F. (2d) 892 (C.C.A. 7th 1941).

Petitioners respectfully request that the relief sought in paragraph 2 of the motion in so far as it applies to any Statement of Contentions made by the respondent shall be limited to the document entitled "Contentions of Counsel for Federal Trade Commission submitted to the Trial Examiner under Rule 22" submitted under date of January 18, 1941 to the Trial Examiner by counsel for the Federal Trade Commission.

2. The Conditional Opposition to Paragraph 4 of the Motion (Resp. Stat. P. 9):

The Commission requests that in designating portions of the transcript to be printed petitioners be required to designate exhibits as well as testimony. Since the designation required by the rule is solely designed to indicate which portions of the record are to be printed, petitioners submit there is no need for designating exhibits if the relief requested in paragraph 1 of the motion to dispense with the printing of exhibits is granted. In that circumstance all exhibits are "designated" in the sense that they are physically before the Court.

3. The Partial Opposition to Paragraph 7 of the Motion Resp. Stat. P. 10):

Counsel for the respondent state that they do not oppose paragraphs 7(a), (b) or (d), but subsequently request that paragraph 7(a) be conditioned by requiring the printing of the 130 page certification of the transcript to this Court if the sufficiency or integrity of the record is to be challenged. There is no valid reason for printing the voluminous certificate of transcript whether its sufficiency, or the

integrity of the record as certified, are or are not challenged since this certificate is on file with this Court.

With respect to paragraph 7(c) of the motion, petitioners are well aware of the fact that it will provide for setting aside Rule 5(d) of the Rules of this Court to the effect that designations of the record are to be printed. If there were no such rule there would have been no occasion for requesting that such printing be dispensed with. Without question the designations under the eleven petitions for re-view of the Commission's order pending in this Court will be extensive and the counter-designations of the Commission will likewise be extensive. The Commission advances no adequate reason why this relief should not be granted. The suggestion that, in some way the designations of the record to be printed in this Court will affect the Commission's rights before the Supreme Court of the United States is wholly without foundation as shown above (p. 6).

4. The Opposition to the Filing of an Amended Certification of the Transcript (Motion Par. 13; Resp. State: pp. 11, 12):

This paragraph of the motion has no relation to and was not intended to extend or modify in any way the time extensions granted to the petitioners within which to file their statements of points, designations of the evidence and motions to adduce additional evidence. Petitioners' only purpose in requesting that an amended certificate be filed is that, the Commission having conceded that a number of documents are included in the certification which are not properly a part of the transcript of record, the certification should be amended so that it is a correct document truly reflecting the record filed in this Court.

Conclusion.

In view of the motion and detailed affidavit filed by the petitioners, the extensive answer to the motion filed by the respondent and the foregoing reply thereto, it is submitted that all matters necessary for the decision on this motion are before the Court and no useful purpose could be served by oral argument.

WHEREFORE, the petitioners respectfully request that the motion be granted in full.

Dated: New York, N. Y., January 8, 1944.

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Filed Jan. 12, 1944, Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Cement Institute, et al., Aetna Portland Cement Co., et al., and Blair S. Smith, et al., *Petitioners,* —against— Federal Trade Commission, *Respondent.*	Cases Nos. 8360, 8361, 8410

IN THE MATTER OF MOTION FOR CONDENSATION OF THE PRINTED RECORD.

SUGGESTIONS OF EDWARD A. ZIMMERMAN, OF COUNSEL FOR PETITIONER, MARQUETTE CEMENT MANUFACTURING COMPANY, IN CASE NO. 8371.

On December 27, 1943, in Cases Nos. 8360, 8361 and 8410, which cases relate to a review of a "Cease and Desist" Order entered by the Federal Trade Commission against various persons and corporations engaged in the Portland Cement Industry, the Petitioners filed a "Motion for Simplifying the Record and Reducing the Portions Which Have to Be Printed." Subsequently, the Federal Trade Commission filed an Answer. Marquette Cement Manufacturing Company, one of the defendants against which

the above Order was directed also filed in this Court a Petition to Review that Order.

Inasmuch as any order relating to the subject matter of the foregoing motion may affect alike all who have petitioned to review the said "Cease and Desist" Order, counsel for Marquette respectfully submits to the Court the following suggestions:

I.

There being no specific provision of the Federal Trade Commission Act as to what part of the transcript of record or proceedings filed by the Commission in the Court of Appeals shall be printed or as to the manner of printing and the supervision thereof, reference must be had to the general powers of the Court of Appeals in this regard, which is as follows:

Title 28, U. S. C. A., Section 219 (P. 292) provides:

"Each Circuit Court of Appeals * * * shall have power to establish all rules and regulations for the conduct of the business within its jurisdiction as conferred by law."

II.

The Circuit Court of Appeals is not bound to adhere to the letter of its rules in any case wherein it appears that the convenience of the Court and the administration of justice require it to do otherwise. Circuit Courts of Appeal have in cases involving special circumstances, such as extraordinarily voluminous records, frequently departed from the strict letter of their rules in order to serve the convenience of the Court and to simplify and condense the record to make it physically possible for the Court to consider and pass upon the essential points in controversy. In none of the cases hereinafter cited were the transcripts filed in the Circuit Courts of Appeal anywhere near as large as the case at bar wherein there are more than 49,000 pages of transcript of testimony and 4,800 exhibits estimated to contain upward of 50,000 pages. Such practice has been specially applied to "Commission proceedings."

A most illuminating case as to the discretion exercised by the Court in simplifying the printing of the record and particularly of the exhibits is *Toledo Pipe-Threading Ma-*

chine Co. v. *Federal Trade Commission*, (C. C. A. 6th, 1925; 6 Fed. (2d), P. 876) as shown in the following per curiam opinion:

"Per Curiam. Recently on our own motion we directed that the record be printed, omitting the exhibits, and providing that either party might print in its brief any exhibits specially relied upon. The Commission now represents that the exhibits form the chief part of the record supporting the Commission's order, and hence, should be printed, and that the petitioner should meet this expense.

"There is neither statute nor rule of court covering the subject of printing records in these proceedings. They are original, not appellate. Upon writs of error or appeals, the taking of proofs has been under judicial supervision, and then the record on appeal is prepared again under judicial direction. There is a fair presumption that it contains a minimum of irrelevant matter. Not so with these Commission proceedings. There seems to be no restraint upon the Commission or respondent in the taking of proofs. Our observation in these cases is that a great share of the record as made up does not require printing. Until the making of some general rule on the subject, the matter of printing in each case must be dealt with separately.

"Our order will be modified, so as to require petitioner to print such a reasonable number of selected and typical exhibits as it may think necessary to present fairly the question involved; the Commission may print in its brief such further exhibits as it thinks especially important; beyond that the court will assume the duty of reading from the unprinted record such further exhibits as may be listed for that purpose by either party."

The case of *Federal Trade Commission* v. *Inecto, Inc.*, (C. C. A. 2d, 1933) involved an application for the enforcement of an order of the Federal Trade Commission. At the instance of the Commission, the Court signed an order providing for the elimination of non-essential portions of the record before printing. The respondent, Inecto, Inc., questioned the power of the Court of Appeals to enter such order and moved to vacate it. The Court denied this motion and afterwards signed an order extending the time within which the Commission should prepare and serve upon the respondent, Inecto, Inc., a memorandum presenting its views as to what revision and condensation of the record should be made.

The respondent, Inecto, Inc., filed with the Supreme Court of the United States on September 12, 1933, its petition for writ of certiorari to review the action of the lower Court in entering the order at the instance of the Commission providing for the elimination of non-essential portions of the record and allowing the Commission to make revision and condensations of the record. Counsel for Inecto, Inc. asserted that the Court of Appeals had acted in excess of its powers, in that its rules provided that the Commission in application to the Court for enforcements of its orders should print the entire record. The Commission filed a brief with the Supreme Court in opposition to the Respondent, Inecto's Petition and thereafter the Supreme Court of the United States denied Inecto's petition (290 U. S. 682).

The foregoing statement is based upon matter appearing in "Statutes and Decisions, Federal Trade Commission, 1930-1938, P. 488-9).

In *E. Griffith Hughes, Inc.* v. *Federal Trade Commission*, (C. C. A. 2nd, 1934) Hughes filed a petition to review an order of the Commission and on March 12, 1934, the Court granted the petitioner's motion to dispense with printing of the exhibits and denied its motion. (Statutes and Decisions, Federal Trade Commission, 1930-1938, P. 489-90.)

In *Federal Trade Commission* v. *E. J. Wallace* (U. S. C. C. A. 8th, 1934) this was an application for enforcement of an order of the Federal Trade Commission. The Court on April 10, 1934, on motion of the Commission entered an order making it unnecessary to print or otherwise reproduce the exhibits in this case for use upon the hearing before the Court of the application for enforcement. In its publications the Federal Trade Commission adverts to this Order and states that "The result of this order was to effect a saving of some $10,000.00 to the Commission." (Statutes and Decisions, Federal Trade Commission, 1930-1938, P. 490.)

James S. Kirk & Co. v. *Federal Trade Commission*, (C. C. A. 7th) (Statutes and Decisions, Federal Trade Commission, 1914-1929, P. 723). This was a petition by the Kirk Company to review an order to cease and desist entered by the Commission wherein it was ordered that in the condensation of the record the report by the Examiner and exceptions need not be included nor printed, but that such report and exceptions may be regarded as an exhibit. The

transcript consisted upwards of 10,500 pages of evidence and several volumes of documentary exhibits and also many physical exhibits.

It appeared that in response to previous order of the Court requiring condensation of the record and statement of evidence in narrative form, the Petitioner, Kirk Company, proposed to present the evidence topically as nearly as may be, so that the evidence of witnesses would appear consecutively under each particular subject, rather than in the order wherein they appeared in the record.

It was recited in the Order that there were hundreds of witnesses and that it was probable that a major part of them had testified on a single proposition or at most on a very limited number of propositions involved; that it would facilitate the orderly consideration of the evidence if in the condensed narrative statement the evidence of the various witnesses were, as nearly as may be, arranged under the various topics or subject matters to which the evidence of the several witnesses was directed.

The motion of the Respondent, Commission, to require the arrangement of the condensed narrative to be in the same order as the record was denied and it was further ordered that the condensed narrative statement of the evidence, prepared as above set forth, be submitted to counsel for the Respondent, Commission, and "if on examination counsel for Respondent shall find it incorrect as to any part or parts, and if they cannot agree with counsel for Petitioner as to a proper statement, they shall prepare such parts only in the form in which they contend they should be, and submit them to counsel for petitioners, and the same shall be printed with the condensed narrative, side by side, as nearly as may be, with petitioner's statement of the same part of the record."

The Court in the order further recited that "It is apparent that in a record of such magnitude, when abstracted in the manner indicated, thorough indexing is necessary; and it is therefore ordered that there shall be a complete index furnished with the narrative statement, showing the witnesses, and other contents of the record, alphabetically, and indicating the place or places in the narrative where the witness's testimony is to be found, and indicating also the volume and page of the record where the testimony is to be found; also a topical index showing alphabetically the various topics, and stating thereunder, alphabetically,

the names of the witnesses and the pages of the narrative statement where their evidence is to be found. There shall also be an index of the various exhibits on file."

It will be noted that this case went to the Supreme Court of the United States and that, pursuant to stipulation, the record as printed in the C. C. A. 7th was used in the proceedings in the Supreme Court.

In *National Harness Manufacturers' Association* v. *Federal Trade Commission*, (C. C. A. 6th, 1919; 261 Fed. 170) the Court waived its Rule 19, and dispensed with the printing of the transcript except as to essential parts. In this case the Manufacturers' Association petitioned for review of a cease and desist order of the Commission and moved to dispense with the printing of the record, and the record not having been printed the Commission moved to dismiss the petition for review. The Court said:

"We think our previous order, which assumed that printing was necessary and thereupon declined to dispense with it entirely, did not sufficiently take into account the character of this proceeding. Our rule 19 (202 Fed. xiii, 118 C. C. A. xiii) provides for the printing of all records, but contemplates only records in those proceedings to which the body of the rules is applicable, viz., records on writs of error or appeals or on some specified petitions. In all these cases the record has been prepared under some supervision which insures printing only the essential parts. This rule 19 should not be interpreted so as to require printing at large such a record as this. By the provisions of this act, the commission conducts a general investigation and takes proofs; there is no judicial regulation of the reception of evidence. Thereupon the commission makes a finding of facts and an order. If the order is not observed, the commission may apply to this court for a mandatory order of enforcement, and file in this court a copy of the entire record and of its finding of facts. In case of such application, there is a provision for taking further testimony, to be ordered by this court, at the request of either party. In case the defendant feels aggrieved by the order of the commission, he may file a petition in this court for review, and the commission is required to file the transcript of the record. The court then has the same duty of review as if the commission had brought the matter here.

"The provision regarding further proofs indicates that the transcript first filed is not of the permanent character

of ordinary transcripts, and that the printing of parts of the original might be rendered inadvisable by later proofs; and though this provision for further proofs does not in terms apply to a defendant's application for review, we should hesitate to construe our printing rule as applicable to one and not to the other method of review.

"The statute further provides that the finding of facts by the commission shall be conclusive, if supported by any evidence. It follows that there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject. The statute further provides that the proceedings shall be in every way expedited and shall be given precedence over all other cases pending.

"All these considerations persuade us that there should be a revision and condensation of the transcript before it is printed. We think a satisfactory practice will be obtained by following the analogy of general equity rule 75 (198 Fed. x., 115 C. C. A. xl). The order, therefore, will be that the former order refusing to dispense with printing be vacated; that the petitioner, within 30 days, prepare and serve upon the commission a statement of such parts of the record as the petitioner thinks should be printed, including a condensed narrative of so much of the testimony as is material to the points to be raised; that within 30 days thereafter the commission propose such amendments to such statement and narrative as it thinks proper; and that, if the parties do not thereupon promptly reach an agreement as to the record necessary to be printed, the matter be brought to the further attention of the Court."

In *Goodyear Tire and Rubber Company* v. *Federal Trade Commission*, (Annual Report of Federal Trade Commission, 1936, Pp. 78-9) the Tire Company filed a petition to review a cease and desist order of the Commission. The Court entered an order for condensation and printing of the record. (C. C. A. 6th, 1936).

In *Federal Trade Commission, Petitioner* v. *Paramount Famous-Lasky Corporation, et al.*, (Statutes and Decisions, Federal Trade Commission, 1930-1938, P. 487) there was an application for enforcement of the cease and desist order by the Commission. As the Commission says in its publication:

"The record in this case, one of the largest ever before

the Commission, comprised more than 17,000 pages and extensive exhibits consisting of more than 15,000 additional pages, a total of over 32,000 pages. By the rules of the Court the burden of printing fell upon the Commission. The size of the record was one of the considerations which lead the Commission to agree that the issue might be confined to Paragraph 2 of the Order relating to 'block-booking'; as a result of this decision considerable time was devoted to considerations looking to the elimination of such of the testimony and exhibits as was irrelevant to the point at issue. By the elimination referred to, the record was reduced to some 2000 pages.

"On March 9, 1931, the Court granted the motions of the Commission: * * * For an order directing a revision and condensation of the transcript, the establishment of such revision and condensation of the record of evidence, and that the Commission cause to be printed only such record."

III.

Rule 36 of the Circuit Court of Appeals, Seventh, (effective September 1, 1943) is a special rule applying to review of orders of the Federal Trade Commission. Section 5 of Rule 36, entitled "Designation of Printed Record, Printing" and Paragraph (a) thereof entitled "Designation After Filing of the Transcript" are the provisions applicable to the problem now before us for consideration and discussion.

The strict application of the provisions of Section 5, Paragraph (a) of Rule 36 will cause great inconvenience to the Court and tend to defeat the fair and impartial administration of justice in that it would result in prohibitive and unnecessary expense and waste of critical material and labor and a printed record of such unwieldy size as to make it physically impossible for any Court to fairly consider it and pass upon the simple issues in the case at bar.

IV.

Counsel for the Commission has represented in the answer to the motion filed by Petitioners in Cases Nos. 8360, 8361 and 8410, that "Most of the findings and conclusions of the Commission are based primarily upon the evidence contained in the exhibits" and that "the tran-

script of oral testimony on which it would rely is largely supplementary and explanatory of the documentary evidence". The answer further argues that "Since much of the oral testimony on which respondent relies is built upon and around the exhibits, there would be no object in designating such testimony for printing unless the exhibits to which it relates are also printed." (Commission's Answer, P. 2).

Since these statements are based upon matter which is peculiarly within the exclusive knowledge of counsel for the Commission and since it follows that the Petitioner's task of designating portions of the transcript must be related to the matter of what will be designated by the Commission, it is, in view of the size of the transcript of testimony (more than 49,000 pages) and the volume of Exhibits (4,800, more than 50,000 pages), respectfully suggested that as a first step that the Court direct that within a reasonable time to be fixed by the Court, the Commission designate the specific exhibits to which it has reference in its answer and which it deems proper to have printed, whether as an Appendix or Supplement to its Brief or otherwise, and the parts thereof which it deems pertinent and relevant to the statements in its answer above quoted, and the pertinent and relevant portions of the oral testimony "on which Respondent relies" and which it alleges "is built upon and around the exhibits".

In this connection, for consideration of the Court it is respectfully suggested that the practice outlined in Rule 35 of this Court relating to "Review * * * of Orders of the National Labor Relations Board"—and particularly paragraph 4 thereof entitled "Printing Record in Appendix or Supplement to Briefs" may be followed with modifications as set forth above. A further suggestion is that this Court may direct that within a time, to be fixed by the Court, after the Commission has made and served upon the several Petitioners the designations of the exhibits and oral testimony which the Commission deems essential to support its findings, conclusions and Order, the Petitioners shall designate and serve upon the Respondent Commission the Exhibits and Oral testimony upon which the Petitioners rely to support their several contentions.

Reverting for a moment to the suggestion above that Rule 35 of this Court might be conveniently made to apply to the case at bar, it is of interest to note that Rule 10 of

the C. C. A. 4th establishes a similar general practice in that Court.

Counsel for Marquette has but one further suggestion to submit as to the Motion under consideration, and that is as follows:

Referring to paragraph 2 of the Motion, which now reads:

"2. That any written Motion, Petition, together with supporting affidavits and statements, or Statement of Contentions filed with the Trial Examiner or the Federal Trade Commission may be submitted to the Court in the original form in which they were submitted to the Trial Examiner or to the Federal Trade Commission, with the same force and effect as though printed."

It is suggested that this paragraph would have a broader coverage and would better serve the convenience of the Court and parties if it read as follows:

"2. That any written Motion, Petition, together with supporting affidavits and statements, or Statement of Contentions and Exceptions to the Trial Examiner's Report on the Evidence, or excerpts from arguments or admissions or statements of counsel in the proceedings before the Federal Trade Commission may be submitted to the Court in the original form in which they appear in the proceedings before the Federal Trade Commission, with the same force and effect as though printed."

It is finally noted as touching upon the matter of the power and discretion of the Court to make a special order in such a proceeding that the Federal Trade Commission in support of its motion to excuse printing of exhibits in *Federal Trade Commission* v. *E. J. Wallace*, in United States Circuit Court of Appeals, 8th, asserted that:

"An order made in a case becomes a special rule for that case. *Hastings* v. *Jones*, 18 Fed. (2d) 833, 834."

Respectfully submitted,

Edward A. Zimmerman,

Of Counsel for Marquette Cement Manufacturing Company in Case No. 8371.

And to-wit, on the 25th day of January, 1944, the following further proceedings were had and entered of record, to-wit:

January 25, 1944
8360, 8361, 8371, 8372, 8373, 8386, 8389, 8393, 8399, 8410.

(Caption.)

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

It is ordered that the motion filed herein on December 27, 1943, for simplifying and reducing the portions which have to be printed be, and it is hereby, granted.

And to-wit, on the 25th day of February, 1944, the following further proceedings were had and entered of record, to-wit:

February 25, 1944.

8402

(Caption.)

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

It is ordered that the motion filed on December 27, 1943, in causes 8360, etc., for simplifying the record and reducing the portions which have to be printed be, and it is hereby, granted in this cause.

* * (Caption—8360-8361-8410) * *

NOTICE AND MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

(Filed Mar. 20, 1944. Kenneth J. Carrick, Clerk.)

Please take notice that on the 20th day of March, 1944, we are filing with the Hon. Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, a joint and several motion on behalf of all petitioners in the above entitled cases, for an order:

1. Granting leave to all petitioners in the above entitled cases, jointly and severally, to adduce additional evidence material in the proceeding before the Federal Trade Commission (hereinafter called the "Commission") entitled "In the Matter of The Cement Institute, an unincorporated association, et al., Docket No. 3167", and material in the review by the Court herein of the proceedings before the Commission, the Findings as to the Facts and Conclusion, and the Order to Cease and Desist made and entered by the Commission on July 17, 1943, in said proceeding; said additional evidence consisting of documentary and other evidence listed in Schedule I, attached hereto and made a part hereof, which was duly offered by and on behalf of petitioners in the aforesaid proceeding before the Commission, but excluded; and

2. Directing that such additional evidence be taken before the Commission and adduced upon the hearing in such manner and upon such terms and conditions as to this Court may seem proper; and

3. Directing the Commission to certify and return such additional evidence to this Court, when taken; and

4. Granting petitioners such other and further relief as to the Court may seem just and proper.

In support of this motion there is attached hereto the affidavit of George S. Leisure, Esq.

Dated: New York, N. Y., March 15th, 1944.

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To:

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SCHEDULE 1

The additional evidence sought to be adduced consists of the following papers, documents and testimony:

Exhibits numbered "Respondents' Exhibits for Identification" in the proceeding before the Commission, (hereinafter referred to as Petitioners' Exhibits), as follows:

239	2201-2204	3023-3031
241-247	2253-2254	3033-3034
715	2295-2300	3043-3044
1030-1035	2302-2304	3047
1403-1404	2373	3108-3110
1421	2397	3143-3144
1491	2406	3146
1669-1686	2411	3148
1699-1701	2526-2529	3165
1824-1829	2558-2561	3170-3173
1831	2563	3174 a, b, e-z3
1832-1838	2578	3175-3176
1841	2611-2629	3375
1844-1847	2654-2655	3385
1861-1866	2766	3430
1868-1869	2793 a, d, i-l	3434-3435
1972-1974	2829-2834	3562
1985-1991	2863	3659-3660
2033-2035	2880	3718-3719
2062	2895	3741-3742
2190	2897-2899	
2194-2197	3002-3003	

SCHEDULE I.

Testimony at the following pages of the Transcript of Record as certified to this Court by the Commission.

8211	32322-26	38970-71
8266	32328-31	38974-75
26897	32729½-31	39018-20
26901	32734	39107
27993-94	32825-27	39539-40
28949	34273-75	39599-600
29422-23	34281-85	41022-23
29429-34	35698-700	41028-30
29559-65	35702-05	41619-20
29575-82	36759	41632-34
29610-11	37580-83	41697-98
30486-89	37791-92	42195-96
30698-700	38074-76	42200
30710-11	38123	42218
31367-73	38152-55	48567-68
31412-13	38217-18	48647
32061-62	38912	
32286-87	38939-40	

SCHEDULE I.

Evidence described in offers of proof appearing at the following pages of the Transcript of Record as certified to this Court by the Commission.

23807	32735	45536-37
23808-09	32826-27	45543
27566-67	35702-03	45550
28847	37171-72	45559
28947-48	37174-75	45569
28949	37582-83	45610-11
29786	38123	45900-01
30066-67	38912	46262-64
30700	39019-20	47470-99
31372-73	40216	47519-23
31412-13	40282-83	47684
32142	44258-63	47687
32287	44691	
32330-31	45452	

Affidavit of George S. Leisure

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Aetna Portland Cement Company, et al., The Cement Institute, et al., and Blaine S. Smith, et al., *Petitioners,* —against— Federal Trade Commission, *Respondent.*	Cases Nos. 8360 8361 8410

State of New York, County of New York. } ss.:

George S. Leisure, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law, duly admitted to practice in the courts of the State of New York, federal courts situated therein and the Supreme Court of the United States and am a member of the firm of Donovan Leisure Newton & Lumbard, the attorneys for the following eighty-three petitioners, namely:* Aetna Portland Cement Company (Aetna), Alpha Portland Cement Company (Alpha), Arkansas Portland Cement Company (Arkansas), Ash Grove Lime and Portland Cement Company (Ash Grove, Bessemer Limestone and Cement Company (Bessemer), Colorado Portland Cement Company (Colorado), Consolidated Cement Corporation (Consolidated), Coplay Cement Manufacturing Company (Coplay), Cumberland Portland Cement Company (Cumberland), Dewey Portland Cement Company (Dewey), Diamond Portland Cement Company (Diamond), Edison Cement Corporation (Edison), Federal Portland Cement Company, Incorporated (Federal), Florida Portland Cement Company (Florida), Georgia Cement and Products Company (Georgia), Giant Portland Cement Company (Giant), Glens Falls Portland Cement Company (Glens Falls), Great Lakes Portland Ce-

* All petitioners are hereinafter referred to by the designation in parenthesis given after their names.

ment Company (Great Lakes), Green Bag Cement Company of West Virginia (Green Bag W. Va.), Green Bag Cement Company of Pennsylvania (Green Bag Pa.), Hawkeye Portland Cement Company (Hawkeye), Hercules Cement Corporation (Hercules), Hermitage Portland Cement Company (Hermitage), Idaho Portland Cement Company (Idaho), Keystone Portland Cement Company (Keystone), Kosmos Portland Cement Company (Kosmos), Lawrence Portland Cement Company (Lawrence), Lehigh Portland Cement Company (Lehigh), Lone Star Cement Corporation (Lone Star), Medusa Portland Cement Company (Medusa), Missouri Portland Cement Company (Missouri), Monarch Cement Company (Monarch), National Cement Company (National), Nazareth Cement Company (Nazareth), Nebraska Cement Company (Nebraska), North American Cement Corporation (North American), Northwestern States Portland Cement Company (Northwestern States), Oklahoma Portland Cement Company (Oklahoma), Oregon Portland Cement Company (Oregon), Peerless Cement Corporation (Peerless), Pennsylvania-Dixie Cement Corporation (Penn-Dixie), Petoskey Portland Cement Company (Petoskey), Pittsburgh Plate Glass Company (Pittsburgh), Portland Cement Company of Utah (Utah), Signal Mountain Portland Cement Company (Signal Mountain), Southern States Portland Cement Company (Southern States), Southwestern Portland Cement Company (Southwestern), Standard Portland Cement Company (Standard), Superior Cement Corporation (Superior), Three Forks Portland Cement Company (Three Forks), Trinity Portland Cement Company (Trinity), Union Portland Cement Company (Union), Valley Forge Cement Company (Valley Forge), Volunteer Portland Cement Company (Volunteer), Vulcanite Portland Cement Company (Vulcanite), Wabash Portland Cement Company (Wabash), West Penn Cement Company (West Penn), Whitehall Cement Manufacturing Company (Whitehall), Wolverine Portland Cement Company (Wolverine), The Cement Institute (the Institute), S. W. Storey, G. H. Reiter, Blaine S. Smith, Frank G. McKelvy, Charles F. Conn, B. H. Rader, Oscar N. Lindahl, J. J. Hornung, Harold M. Scott, John J. Porter, Harry F. Jennings, Walter C. Russell, Monroe C. Monday, L. J. Capen, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Victor N. Roadstrum, Joseph

S. Young, R. A. Hummel, J. B. John all of whom, hereinafter collectively referred to as petitioners) are seeking review of an Order to Cease and Desist of the Federal Trade Commission (hereinafter referred to as the Commission) made on July 17, 1943, in a proceeding before the Commission entitled "In the Matter of The Cement Institute, an unincorporated association, et al., Docket No. 3167."

2. This affidavit is submitted in support of a motion on behalf of petitioners for leave to adduce additional evidence which is material both to the proceeding before the Commission and to the review of said Order of the Commission by this Court. The additional evidence was offered by petitioners in the proceeding before the Commission but excluded.

3. This motion is made under Section 5(c) of the Federal Trade Commission Act (11 U. S. C. A., Sec. 45[c]) and Section 11 of the Clayton Act (11 U. S. C. A., Sec. 21) in order that petitioners, having exhausted their administrative remedies with respect to the exclusion of the additional evidence, may preserve their right to urge before this Court error in its exclusion. The same error is assigned in Assignment No. 39 of petitioners' Statement of Points filed concurrently herewith.

4. This affidavit is made by deponent rather than by petitioners because of the joint and several nature of this motion, and because deponent's firm alone has available in its files all the testimony, exhibits and other records and indices thereto of the proceedings before the Commission and deponent has greater familiarity with said proceedings and with all the evidence now sought to be adduced than said petitioners have.

5. Under Section 5(c) of the Federal Trade Commission Act and Section 11 of the Clayton Act this Court has exclusive jurisdiction of this proceeding by reason of the filing with it on July 26, 1943 (in Cases Nos. 8360 and 8361) and on September 13, 1943 (in Case No. 8410), respectively, of the petitions to review and set aside the Commission's Order of July 17, 1943, and the filing on September 1, 1943 of the certified transcript of the record of the proceedings before the Commission. Pursuant to orders of this Court dated August 6, 1943, August 18, 1943 and September 20, 1943, the statement of points, designation of portions of

the record to be printed, and a motion for leave to adduce additional evidence must be filed in this Court on or before March 20, 1944.

The Nature of the Issues Raised by the Pleadings.

6. The Order of the Commission under review stems from its complaint issued on July 2, 1937, against the Institute, an unincorporated trade association, certain of its officers, and seventy-five corporations engaged in the manufacture or sale of Portland cement, including the fifty-nine corporate petitioners, all alleged members of the Institute.

7. The complaint is founded on a charge of nation-wide combination to restrain price competition through the agreed use of a so-called "multiple basing point system." It contains two counts, the first alleging unfair competition under Section 5 of the Federal Trade Commission Act, the second alleging discrimination in price in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

8. Count I alleges that under this "multiple basing point system" all cement is sold only at delivered prices, that there is a governing basing point for every destination in the United States, which, for any particular destination, is the point whose base price plus all-rail freight produces the lowest price at that destination and that quotation of identical delivered prices results. This count also alleges the agreed use of certain specified, and other unspecified, practices and means allegedly used to "effectuate the combination."

9. With respect to the Institute, the complaint alleges that it is not engaged in commerce but is engaged in aiding the producing respondents to carry out alleged unlawful methods which substantially affect competition among its members. The complaint does not charge that the Institute has used a "basing point system" or any other system or method of pricing.

10. Count II repeats the allegations of the nation-wide combination to restrain price competition by use of the "multiple basing point system", and charges that delivered prices, since they include cost of transportation, are not true prices, and that variations in mill nets, the

alleged true prices, result from the "combination" and constitute unlawful discriminations in price by each seller among his customers.

11. The respective corporate petitioners filed separate answers which are the same fundamentally in that all contain a general denial of the material allegations of the complaint. Many of these answers contain affirmative defenses as to the natural development of their pricing methods and the necessity for employing such methods in order to meet competition; explaining that such identity of prices as may occur is the natural result of competition, and that so-called "base mills", "base prices" and "basing points" in the industry have not been the result of any agreement or arbitrarily determined or fixed in amount, number or location, but, on the contrary, that many delivered price never have reflected so-called "base prices" and that many mills never have been so-called "base mills." The answers further state that all of petitioners' methods and practices have been developed independently under competitive stress and are in the best interests of all concerned in the production, sale and use of cement. In answer to Count II of the Complaint they allege that "price" in the Robinson-Patman Act does not mean mill net as alleged in the complaint and that the "price" of cement is the amount paid by the buyer for cement delivered at destination; also that there has been no injury either to buyers or sellers of cement and that when sales are made by any cement producer at a price identical with those of any other sellers, such producer is either meeting in good faith the price of a competitor or its price is being met by a competitor. Finally, these answers allege that quoting uniform f.o.b. mill prices, the alternative to quoting destination prices, would cause drastic shrinkage in the market of each mill, reduce competition and foster monopoly.

12. The answer of the Institute, its officers and trustees, denies the existence of the combination charged in the complaint, alleges that the Institute is not engaged in the manufacture and sale of cement and that it has not employed basing points, a "basing point system", or any other marketing or pricing method. This answer alleges further that the Institute has never influenced or endeavored to influence the marketing policies of its members and that it has not promoted, aided or participated in any agreement or understanding concerning the marketing

methods of its members or any others. An affirmative defense setting forth the purposes and the activities of the Institute is also set out.

13. A more detailed statement of the issues raised by the complaint and answers is contained in the petitions to review filed herein by these petitioners. Specific reference to the particular issues and findings of fact or conclusions to which the various items of excluded evidence, sought to be adduced herein, relate is set forth in detail below.

14. On July 17, 1943, following the hearings below and other intermediate steps which will be referred to later, the Commission made its Findings as to the Facts and Conclusions, together with the Order here for review. The findings and conclusions are generally unfavorable to petitioners on the principal issues and the Order directs the cessation of an alleged "combination" and cooperative action with respect to the "multiple basing-point delivered-price system" and various alleged practices in support thereof. As will appear from petitioners' Statement of Points, the Order is attacked on the grounds, among others, that it nullifies their constitutional right to meet competition, that there is no evidence of conspiracy concerning the acts prohibited, and because it is unlawful and improper in content and form. The findings and conclusion are likewise attacked on the ground that they are not supported by the evidence, that they are incomplete and fail to find many essential and uncontroverted facts, and because they exceed the issues and are so vague, speculative, argumentative and misleading as wholly to lack the requisites of proper findings as required by law. Some findings bear out petitioners' contentions on fundamental issues and are thoroughly inconsistent with the remainder and with the findings of ultimate facts and the Commission's conclusion.

The Proceedings Before the Commission.

15. Evidence was taken before a Trial Examiner, appointed by the Commission, beginning on December 1, 1937, and continuing, except for certain recess periods, until November 29, 1940. During the course of these hearings numerous objections and exceptions were duly made and noted on behalf of petitioners, and several motions on

their behalf, with respect to the reception and rejection of evidence and to strike and limit the application of evidence were addressed to the Trial Examiner and to the Commission.

16. Upon the conclusion of the hearings before the Trial Examiner, at the Examiner's request and pursuant to the Rules of the Commission, petitioners, on January 27, 1941, filed statements of contentions as to the facts proved and responded to a questionnaire regarding said facts submitted by the Trial Examiner. Thereafter, in May, 1941, the Trial Examiner made and filed his Report Upon the Evidence. In November, 1941, extensive exceptions in writing to this report were filed with the Commission on behalf of petitioners. Subsequently, in May, 1942, upon said exceptions and upon written briefs filed on behalf of the petitioners and on behalf of the Commission, oral argument was had before the Commission. On July 17, 1943, the Commission filed its Findings as to the Facts and Conclusion and an Order to Cease and Desist directed against the petitioners and, concurrently therewith, overruled all objections and exceptions and denied all motions theretofore made by and on behalf of the petitioners in the course of the proceedings.

17. The transcript of record filed by the Commission includes 49,000 pages of oral testimony and over 5,000 exhibits totalling more than 50,000 additional pages. Notwithstanding the size of the existing record, over 900 exhibits and testimony of witnesses relevant and material to the issues and relating to proof offered by the Commission, were offered on behalf of petitioners and excluded by the Trial Examiner and in addition, over 400 other exhibits were marked for identification by petitioners but were not offered because of standing adverse rulings by the Trial Examiner. Exceptions to such exclusion of petitioners' evidence by the Trial Examiner were duly noted not only before the Trial Examiner but were urged before the Commission as error of the Examiner and overruled and denied as heretofore stated.

The Reasons for This Motion.

18. Petitioners, in their Statement of Points, filed concurrently herewith, have assigned as error the exclusion of selected portions of this evidence believing that such

exclusion affects their substantial rights in this proceeding. Deponent believes that in order to preserve the right of petitioners to urge error with respect to the exclusion of such evidence, procedure for review of orders of administrative tribunals requires that, in addition to assignment of error, a motion be made to the reviewing court for leave to adduce such excluded evidence as additional evidence to be taken and certified to the Court in connection with the proceeding. Accordingly, petitioners are seeking leave to adduce the evidence specified herein in order to preserve their right to urge error with respect to its exclusion and so that it will be available, if need be (under the decision of this Court in *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 F. (2d) 942, 945 [1931]), for consideration in conjunction with the other substantial evidence of petitioners in the record. This motion is not made for the purpose of delay in the hearing of these causes by this Court and, if this motion be granted, petitioners are ready and willing to make every effort to arrive at a stipulation with counsel for the Commission with respect to the evidence sought to be adduced.

19. The evidence sought to be adduced, broadly speaking, is material to and disproves the charge of combination, largely through contemporary documents and records made in the regular course of business showing the independent action of the respective petitioners with regard to a variety of subjects referred to in the Commission's findings. In brief, the evidence relates to the independent considerations which have moved the petitioners* in connection with instances of identical bids, the use of delivered prices, specific price changes, specific market practices and dealer policies, their respective positions concerning trucking of cement, the use of land grant rate information, and the alleged retention of the benefits of means of transportation cheaper than rail.

20. The materiality of each of the items of evidence sought to be adduced is more particularly stated in the discussion with respect to each of the groups of evidence set forth below. In each of such groups there is contained

* The petitioners in Cases Nos. 8361 and 8410 are not and never have been engaged in the production and sale of cement and accordingly statements herein regarding commercial acts and practices are limited to the corporate petitioners in Case No. 8360.

a list of the excluded exhibits, related testimony and offers of proof, with transcript page references, the name of the petitioner through whom the evidence was offered, followed by a brief description of the evidence, its purpose, materiality, and the grounds of exclusion. The offers of proof are set forth in full in Appendix "A" annexed hereto and made a part hereof. The original exhibits are submitted to the court in a separate binder, marked Appendix "B" filed herewith and made a part hereof. The offers of proof are arranged in Appendix "A" in order of their appearance in the transcript of the record and are listed in a page index at the front thereof. The exhibits are arranged in numerical order in Appendix "B" and are also listed in a page index at the front thereof.

21. The evidence sought to be adduced herein is limited to less than 200 exhibits together with related testimony and offers of proof, although in the proceedings before the Commission over 1300 exhibits offered or attempted to be offered by petitioners were excluded. The particular items of evidence herein specified represent a selected and typical cross-section of the considerable body of evidence offered by the petitioners or intended to be offered by them but precluded by action of the Commission.

Subject I.

Explanations of bids, tabulations of which were received in evidence.

22. Several hundreds of tabulations of sealed bids submitted by individual corporate petitioners to state and federal purchasing agencies were offered and received in evidence on behalf of the Commission as the basis for an inference of agreement, combination and conspiracy among the respective bidders. In order to rebut this inference by the only method open to them under the doctrine of *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939), petitioners presented as witnesses responsible officers of each of the companies that had submitted the bids referred to in the tabulations relied upon by the Commission. The testimony of these witnesses and the documentary evidence which each was prepared to produce was calculated to show the independent action of and the method employed by each bidder in determining the prices, terms and con-

ditions of sale actually quoted, and the absence of any communication, understanding or agreement with any other petitioner in connection therewith.

23. During the testimony of the second of such witnesses called on behalf of the petitioners, upon objection by Commission counsel, the Trial Examiner began to curtail such proof. Although a considerable amount of such evidence was received on behalf of some petitioners, a large amount was excluded as to many petitioners, and as to some petitioners substantially all evidence of this character was excluded, and these petitioners as well as all others to whose benefit such evidence would accrue, have been deprived of a full opportunity to defend themselves in the face of the charge of combination and the finding that the price identity in question illustrates "the perfection of respondent's pricing formula" and the conclusion of the Commission of combination.

24. The evidence following, sought to be adduced in this connection, is a representative selection of the evidence so rejected.

Pet. Exs. 1861-1866[1] (Superior); Tr. 29762-66, 29771-72, 29775-79, 29781-87, 29790, 29795-96, 29798; offer of proof, Tr. 29786.

Pet. Ex. 2880 (Pittsburgh); Tr. 37890-92; 37894.

Pet. Ex. 3047 (National); Tr. 39667-69.

25. The above evidence is material as showing petitioners' lack of collusion and independent considerations, first, in computing bids on federal lettings which are cited in the findings as illustrative of "The perfection of respondents' pricing formula in producing identical delivered prices",[2] and, second, in not bidding on the Government's indefinite, post-complaint "Good Friday" f.o.b. mill invitations.[3]

26. The exhibits consist of office copies of bids, memoranda and correspondence, and individually prepared office price records, all made in the regular course of business, showing successful bids at the same price and desti-

[1] Each of the Exhibits referred to herein as "Pet. Ex." was marked as a "Respondents Exhibit for Identification" in the proceedings before the Commission.

[2] Findings of Fact, par. 9(b); Com. Exs. 180-A, 373-A; *cf.* also Complaint, Count I, pars. 4, 6, 8 (preamble); Count II, par. 8; Findings of Fact, pars. 6(a), 7(a), (c), (h), 24(d).

[3] Com. Ex. 1339.

nation on prior lettings and that the current market price was the same as the bid. They consist also of contemporary office memoranda listing and weighing the personal advantages and disadvantages of the "Good Friday" invitation. They were excluded as "merely * * * files" (Pet. Exs. 1861, 1866), because oral testimony could be given (Pet. Ex. 2880) and as irrelevant and covered by oral testimony (Pet. Ex. 3047).

Subject II.

Evidence of f.o.b. mill bids or sales and evidence showing the requests of public purchasing agencies for delivered prices.

27. The several hundreds of tabulations of sealed bids offered and received in evidence on behalf of the Commission and referred to in Subject I, supra, consisted, in the main, of delivered price bids. It is charged in the complaint, and the findings of the Commission state, that petitioners have "thwarted the efforts of government officials to secure f.o.b. mill prices on cement" and refuse to quote f.o.b. mill prices.

28. In two respects the efforts of petitioners to meet this charge were curtailed and rejected by the Trial Examiner, first: in rejecting evidence offered by petitioners showing literally hundreds of f.o.b. mill bids where such bids were requested; and second: in rejecting incontrovertible evidence that public purchasing agencies generally request that they be quoted delivered prices. Obviously, the evidence that petitioners usually quote delivered prices could scarcely be urged by the Commission as proof of agreement to sell only at delivered prices in the face of the evidence of petitioners, if received, that that is the way purchasing agents usually want prices.

29. A substantial number of petitioners' exhibits thus rejected were produced and identified by a government employee testifying for the Commission. The Commission having selected and received in evidence those it chose, petitioners subsequently, in their direct case, offered a number not desired by the Commission.

30. The following is a representative selection of the evidence of f.o.b. mill bids and sales herein sought to be adduced:

Pet. Exs. 239, 214-247; Tr. 21416-18, 21901-02, 21904-05.

Pet. Exs. 2829-2834 (Southern States); Tr. 37588-89, 37592-93.

Pet. Exs. 3002-3003 (Southwestern); Tr. 39104 39106-10.

Pet. Exs. 3165, 3170-3173, 3174-a, b, e-z3, 3175-3176 (Medusa); Tr. 40272-73, 40275-76; offer of proof, Tr. 40282-83.

Pet. Exs. 3659-3660; Tr. 47677-80, 47682-84, 47686-87, 47688-701, 47704; offer of proof, Tr. 47684, 47687.

31. The above evidence is material as showing that petitioners have not "thwarted the efforts of government officials to secure f.o.b. mill prices on cement",[1] and did not collude in "resistance to" such prices,[2] but, on the contrary, made hundreds of unqualified f.o.b. mill bids to government agencies, both before and after the date of the complaint when requested and when other conditions of the invitations could be met. The finding of "resistance" to f.o.b. mill bids is at variance with the statement of the Trial Examiner during the hearings, that he thought it had "never been disputed" that the federal government made its awards on the basis of delivered costs, and that many petitioners did not make mill prices because it would have been "useless".[3]

32. The exhibits and offers of proof consist of and relate to verified abstracts, regularly kept office records and tabulations from such records showing f.o.b. mill bids by numerous petitioners to various government agencies such as the War Department, Treasury Department, Department of Agriculture and Department of the Interior, during the period from December, 1924 to November, 1940. As stated above, some of the exhibits (Pet. Exs. 239, 241-247) which were dated subsequent to the complaint, had been produced and identified by a government employee testifying for the Commission. These were excluded subsequently, when offered by petitioners because the witness was not on the stand at the time of the offer. Many of the others were dated subsequent to the complaint and excluded on that ground, but on the understanding that it

[1] Complaint, Count 1, par. 7(d); *cf.* also par. 4.

[2] Findings of Fact, par. 7(r); *cf.* also pars. 6(a), 7(h).

[3] Tr. 28050-1.

would not be necessary to call witnesses for the formality of identifying them (e. g. Pet. Ex. 3659). The same time-saving convenience was denied with respect to a tabulation of the essential details of scores of f.o.b. mill bids during the years prior to the complaint (Pet. Ex. 3660) and it was excluded upon objection that full details were lacking, that copies of the bids were not available, and upon the refusal of Commission counsel to check its accuracy through the government offices in question.

33. The following, is a representative selection of the evidence showing that public purchasing agencies desire delivered prices:

Pet. Exs. 1403-1404 (Keystone); Tr. 27561-67; offer of proof, Tr. 27566-67.

Pet. Exs. 1699-1701 (Southwestern); Tr. 28930-31, 28933-35, 28937-38, 28941-42, 28946; offer of proof, Tr. 28947-49.

Pet. Exs. 1862, 1864, 1868-1869 (Superior); Tr. 29762-66, 29781-83, 29785, 29791-98; offer of proof, Tr. 29786.

Pet. Exs. 2295-2300 2302-2304 (Bessemer); Tr. 32129-34, 32136-37; 32139-42; offer of proof, Tr. 32142.

Pet. Exs. 2793 a, d, i-l (Missouri); Tr. 37167-75; offer of proof, Tr. 37171-72, 37174-75.

Pet. Ex. 3385 (Hawkeye; Tr. 41710-11.

Pet. Exs. 3434-3435 (Monarch); Tr. 42269-76.

Pet. Exs. 3718-3719(Glenn Falls); Tr. 47902-5; 47911.

Testimony (Southern States); Tr. 37580-83; offer of proof, Tr. 37582-83.

34. The above evidence is material as showing that the concession by Commission counsel and the Trial Examiner that cement purchasers desire delivered prices, applies as well where the purchasers are government agencies, and is a primary reason for petitioners' practice in selling at such prices. The evidence is a vital adjunct to the stipulation of Commission counsel that petitioners could show numerous requests of "customers" for delivered prices,[1] and to the ruling of the Trial Examiner that it would "serve no good purpose to continue to offer * * * papers to show that dealers desired delivered prices", because it had been illustrated "enough" and there was not "any evidence * * * to the contrary".[2] The same concessions were not

[1] Tr. 36888-90.

[2] Tr. 36888-90, 27567.

made regarding federal and state agency purchasers. Despite the fact that such evidence overcomes the charge[1] of colusion in selling at delivered prices and despite the statements of the Trial Examiner at the hearings, the Commission's findings state that "substantialy all sales . . . are made on the basis of a delivered price" and contain the suggestion that this is the result of understandings and agreements.[1] There is a complete failure to find with respect to this factually undisputed explanation of the practice.

35. The evidence consists of and relates to formal invitations, correspondence and other requests from various state and federal agencies for destination prices, both before and after the date of the complaint. It was excluded for varied reasons, on different occasions, such as that it was unnecessary (Pet. Exs. 1403-1404), cumulative (Pet. Exs. 2295-2300, 2302-2304, 2793), not relevant to any bids in evidence (Pet. Exs. 1868-1869), subsequent to the date of the complaint (Pet. Exs. 1699-1701, 3434, 3718-3719), and that some of the invitations for delivered prices were not shown to have been acted on by petitioners (Pet. Exs. 862, 1864).

Subject III.

Non-collusion on specific changes in price.

(1) February, 1930

Pet. Ex. 2373 (Lone Star); Tr. 33081-87, 33089-90.

(2) March, 1931

Pet. Exs. 2654-2655 (Hermitage); Tr. 36139-42, 36144-45.

(3) July, 1932 and March, 1933.

Pet. Exs. 3143-3144, 3146, 3148 (Medusa); Tr. 40209, 40211, 40213, 40216-17; offer of proof, Tr. 40216.

Testimony (Lone Star); Tr. 32825-27; offer of proof, Tr. 32826-27.

(4) July, 1933

Pet. Exs. 1669-1686 (Southwestern); Tr. 28827-32, 28835-37, 28839, 28843-52; offer of proof, Tr. 28847.

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[1] Complaint, Count I, par. 5(a).

[1] Findings of Fact, pars. 7(a), 6(a).

(5) September, 1935 and January, 1937
Pet. Exs. 2611-2629 (Wolverine); Tr. 35982-83, 35985.
Pet. Ex. 2863 (Pttisburgh); Tr. 37788-95.
Testimony (Superior); Tr. 29579-82, 48567-68, 48647.
Testimony (Pittsburgh); Tr. 37791-92.

(6) January, 1936
Pet. Exs. 1824-1829 (Southwestern); Tr. 29386-87, 29392-93.

(7) December, 1936
Pet. Exs. 1985-1991 (Aetna); Tr. 30062-64, 30066-67; offer of proof, Tr. 30066-67.

(8) March-April, 1938
Pet. Exs. 3043-3044 (National); Tr. 39601-05, 39607-08, 39610.

36. This evidence is material as showing the independent considerations, actions and information upon which individual petitioners acted in making specific price changes concerning which the Commission introduced evidence, allegedly in support of its charges that "prices are made through a concert of action", and that petitioners "maintained * * * an artificial price level."[1] The Commission found that there has been no "systematic exchange" among petitioners "of basing-point prices or changes in such prices."[2] This excluded evidence further demonstrates that there is no exchange, "systematic" or otherwise, of such information and that prices are made wholly independently.

37. The evidence consists mainly of salesmen's reports, inter-office memoranda, correspondence and competitors' announcements of price changes received from customers, all made or kept in the regular course of petitioners' business, together with related testimony. It shows the independent sources in the field from which petitioners learned of competitors' price changes, that the desire to meet competition and independent considerations such as individual losses and freight rate changes, led petitioners to adopt similar changes; that, at times, competitors' changes were not followed, and that changes were effected without reference in advance to the reaction of competitors. This evidence was excluded in most instances as repetitious of

[1] Complaint, Count I, par. 8(c).
[2] Findings of Fact, par. 9(e).

oral testimony or as covered by the general evidence (Pet. Exs. 2373, 1669-1686, 2611-2629, 1985-1991, Tr. 32825). The evidence regarding individual losses preceding a price increase was rejected as irrelevant (Pet. Ex. 2863, Tr. 37791-92, 29579-82, 48567-68, 48647).

Subject IV.

Economic reasons for petitioners' pricing practices.

Pet. Ex. 2895 (Penn-Dixie); Tr. 38059-63, 38069-76.

Pet. Exs. 2897-2899 (Penn-Dixie); Tr. 38104-07, 38109-10, 38113-14, 38117-19, 38122-23 38156, 38275, 38288-91; offer of proof, Tr. 38123.

Pet. Ex. 3562; Tr. 46403-07, 46409-10, 46412-13, 46414-15, 46417-18.

Testimony (Penn-Dixie); Tr. 38074-76, 38123.

38.. This evidence is material as showing the cement freight rate scales for various areas of the United States, the need for and fairness of freight-absorbing sales, and the design of the Interstate Commerce Commission, through the rate structure, to avoid discrimination between nearby and distant shippers. It is opposed to the charges under both counts of the complaint, of collusion in the use of destination prices;[1] and to the statements in the findings to like effect.[2] It supports petitioners' defenses that such prices are necessary to meet competition, that the alternative method of quoting at uniform f.o.b. mill prices would cause drastic shrinkage in the market of each mill, reduce competition and foster monopoly.[3]

39. The evidence consists of rate maps for the entire area east of the Rocky Mountains, for the Lehigh Valley and for Kentucky, a historical statement of the basic decisions of the Interstate Commerce Commission, and a comparison of rate scales for distances up to 1,000 miles based on orders of the Interstate Commerce Commission, all of which were verified for accuracy. The exhibits and testimony were excluded as irrelevant except that the Trial Examiner at first admitted two of the exhibits (Pet. Exs.

[1] Complaint, Count I, par. 5(a), Count II, pars. 1-5.

[2] Findings of Fact, pars. 6(a), 7(a).

[3] See Answers to Complaint.

3562, 2897) as relevant to the reasonableness of cross-hauling and to the necessity, under the rate structure, for freight absorbing sales, but he later reversed himself as to one (Pet. Ex. 3562) on the ground it was in the nature of a chart, and as to the other, on his own motion, without assigning any reason (Pet. Ex. 2897).

Subject V.

Independent action on prepayment of freight.

40. The testimony of a witness disclosed that in or about January, 1940, two and one-half years after the date of the issuance of the complaint herein, competitive conditions had compelled a change in his marketing area from what had long been the fairly general practice of billing freight to the consignee on cement shipments, to the practice of prepaying such feight. Commission counsel thereafter developed from other witnesses that the policy of prepayment of freight had since been adopted by many of the petitioners. This was then argued as another instance of identical practices, pursuant to the alleged combination.

41. All efforts on the part of individual petitioners, however, to give testimony and to produce documentary evidence to explain the circumstances surrounding this change in practice by their companies in order to dispel any possible inference of colusive action, were precluded by the Commission on the ground that this was something which had occurred after the date of the complaint. (This ground for exclusion was a recurring one with respect to any proof offered by petitioners, although all evidence offered by the Commission regarding post-complaint matters was received on the theory that it tended to show continuation of the conspiracy [see Subject XIII, infra].)

42. The following is a representative selection of this evidence herein sought to be adduced:

Pet. Ex. 3375 (Hawkeye); Tr. 41655-57.

Pet. Ex. 3430 (Monarch); Tr. 42246-47.

Testimony (Federal); Tr. 30710-11.

Testimony (Southwestern); Tr. 38939-40, 38970-71, 38974-75.

Testimony (National); Tr. 39539-40, 39599-600.

Testimony (Hawkeye); Tr. 41619-20, 41632-34, 41697-98.

Testimony (Monarch); Tr. 42195-96, 42200, 42218.

43. The above evidence is material as showing that cement shippers learned of prepayment of freight by competitors through customers and salesmen in the field, in the same manner they are found to have learned of price changes,[1] and that they adopted the practice in order to meet competition, after inquiries by customers concerning the service. It defeats the charge of collusion "to eliminate * * * diversions in transit" as a "means whereby the * * * pricing system may be impaired",[2] and the findings to like effect,[3] and dispels any implication in the findings of agreement to use prepayment to prevent diversions.[4]

44. The evidence consists of salesmen's reports, interoffice memoranda, and competitors' announcements and written inquiries received from customers concerning prepayment, all kept in the regular course of business; also of testimony that prepayment was adopted to meet competition, and that there was no related discussion or contact with competitors. It was excluded as matter subsequent to the date of the complaint, despite the fact that the findings expressly state "Some two years after the * * * complaint * * * the corporate respondents generally began prepaying * * *."[4]

Subject VI.

Dealer opposition to and disapproval of trucking.

Pet. Exs. 2033-2035 (Aetna); Tr. 30137-41.
Pet. Exs. 2558-2561, 2563 (Edison); Tr. 35689-93.
Pet. Ex. 2766 (Kosmos); Tr. 36954-57.
Testimony (Bessemer); Tr. 32286-87; offer of proof, Tr. 32287.
Testimony (Penn-Dixie); Tr. 38152-55, 38217-18.

45. This evidence is material as showing that the positions of individual petitioners regarding trucking of cement have not been collusive and are the direct result of opposition by dealers and of the necessity for meeting competition in services, ascertained from the field. [See also

[1] Findings of Fact, par. 9(e).
[2] Complaint, Count I, par. 7(c).
[3] Findings of Fact, par. 12(a).
[4] Findings of Fact, par. 12(e).

reference to "trucking costs", Subject VII, infra.] It disproves the charge of "combination" against trucking as a "menace" to the "pricing system",[1] and such findings as that "the effect of trucking on prices * * * was the motivating cause" of petitioners' positions.[2] At the same time it will aid in giving proper and logical effect, which is now lacking, to the finding that "dealers began to oppose * * * and * * * did not want" trucking.[3] Commission counsel conceded that countless dealers could be produced to testify they did not discuss trucking at joint meetings with producers, and admitted that "some dealer organizations * * * opposed trucking".[4] Nevertheless, said counsel viewed the dealers' opposition as just another conspiracy, and there are findings to the same effect.[5]

46. This evidence consists mainly of correspondence to and from dealers in the regular course of business, containing their complaints regarding truck deliveries, expressing their objections to truck deliveries for such reasons as the waste of their investment in railroad sidings, and expressing their disapproval of truck delivery and approval of its discontinuance. The evidence also includes salesmen's reports of competitors' activities in discontinuing trucking, testimony as to the effect of such activities on individual petitioners' policies and that dealers considered trucking a threat to their existence. The exhibits were excluded as covered by the admission by Commission counsel that some dealers disapproved of trucking, and as relating to an uncontroverted subject (Pet. Exs. 2558-2561, 2563); also on the ground that documents would be cumulative and hearsay, though not testimony (Pet. Exs. 2033-2035), and on the basis of a merely general objection (Pet. Ex. 2766). The testimony was excluded as relating to matter already covered (Tr. 32286-87) and to matters subsequent to the complaint (Tr. 38152-55, 38217-18).

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[1] Complaint, Count I, par. 7, preamble and subd. (b).

[2] Findings of Fact, par. 11(b), and see subds. (a), (c)-(h).

[3] Findings of Fact, par. 11(e).

[4] Tr. 36750; 35690.

[5] Tr. 35690; Findings of Fact, par. 11(b), (e).

Subject VII

Comparative cost of truck and rail delivery.

Pet. Ex. 2411 (Peerless); Tr. 34260, 34263-66.
Testimony (Peerless); Tr. 34273-75, 34281-85.
Testimony (Penn-Dixie); Tr. 38152-55, 38217-18.
Testimony (Southwestern); Tr. 38912; offer of proof, Tr. 38912.
Testimony (Medusa); Tr. 41022-23, 41028-30.

47. This evidence is material as showing that often there is no benefit or saving from the trucking of cement to be passed along to the consumer, since in many cases trucking rates filed with the I.C.C. and various state public service commissions are equal or comparable to rail rates and trucking requires extra expense for loading and other facilities at the plant. It disproves the charge and finding of a "combination" against trucking which prevented savings to consumers and of "monopolizing" by petitioners of "the benefits of * * * cheaper means of delivery".[1] The finding was made in spite of a ruling by the Trial Examiner that "Trucking costs are not in issue", and his opposition to the offer of "any more evidence on that subject", as well as Commission counsel's concession that petitioners "make some deliveries by truck", and that "when the trucking rate is * * * more than the rail they absorb it".[2]

48. The exhibit (Pet. Ex. 2411) consists of a tabulation of rail and trucking rates filed in Michigan, prepared in the regular course of business. The testimony related to the extra costs involved in trucking. The exhibit and some of the testimony (Tr. 41022-23, 41028-30) were excluded on the ground that delivered prices were not based on trucking rates. Other testimony was excluded on the ground that trucking costs were not in issue (Tr. 34273-75, 34281-84), or had been gone into sufficiently (Tr. 38912), and the remainder as relating to a period subsequent to the complaint (Tr. 38152-55, 38217-18).

[1] Complaint, Count I, pars. 7(b), 8(g); Findings of Fact, par. 26.
[2] Tr. 34283, 34285.

Subject VIII

Comparative cost of rail and water delivery.

Pet. Ex. 715 (Alpha); Tr. 23801-02, 23805-10; offer of proof, Tr. 23807, 23808-09.

Testimony (Edison); Tr. 35698-700, 35702-05; offer of proof, Tr. 35702-03.

49. This evidence is material as showing that the cost of water transportation of cement, which requires rail connections, is sometimes greater than all-rail, and that petitioners located near waterways have not charged the increased cost to the customer or refused or attempted to discourage such deliveries. It rebuts the charge and finding that by reason of "combination", petitioners, while availing themselves of "these cheaper means of delivery", "prevent purchasers from * * * obtaining benefits".[1]

50. The exhibit consists of a tabulation of rail and water transportation rates from Alsen, New York, on the Hudson River, to various destinations on Long Island, showing the rail rate to be cheaper in the great majority of cases. It was excluded as irrelevant. The testimony was offered by a petitioner which made water deliveries from New York Harbor and was excluded on the ground that it did not meet "any issue whatsoever", with the added statement by the Trial Examiner that "the entire line should be ruled out."[2] In spite of this ruling the Commission made the finding stated above.

Subject IX

Reasons for Lingeman's resignation and Cree's discharge.

51. One of the principal witnesses for the Commission was a former employee of petitioner Aetna named Harold Cree. While so employed as sales manager, he had, according to his testimony, maintained "at home" a file of company correspondence and documents. Armed with this file, his testimony recounted alleged meetings and agreements with competitors in his sales area. Obviously disgruntled and apparently jobless, his testimony, on its face,

[1] Complaint, Count I, par. 8(g); Findings of Fact, par. 26.

[2] Tr. 35,700.

is to say the least not wholly reliable. In addition, his veracity was badly shaken on cross-examination and vigorously attacked by impeaching witnesses to the extent permitted by the Commission. It was claimed (and so found) by the Commission that he and the general manager of the company, Oscar Lingeman, were discharged by petitioner Aetna because they would not "conform to the pricing and marketing practices established by the respondents." An abundant amount of authentic documentary evidence from the office files of petitioner Aetna, demonstrating that by the management of these individuals the company had lost $750,000 in a few years immediately preceding Lingeman's resignation and Cree's discharge, and that they were inefficient and unreliable, was offered on behalf of Aetna and rejected. The following is the evidence to this effect herein sought to be adduced:

Pet. Exs. 1831-1838, 1841, 1844-1847 (Aetna), Tr. 29422-25, 29428-29, 29439-40, 29442-43, 29447-55, 29458-60, 30175-78, 30197-202, 30204.

Pet. Exs. 1972-1974, 1985-1991 (Aetna); Tr. 29960-61, 29978-79, 29982-85, 30062-64, 30066-67; offer of proof as to Pet. Exs. 1985-1991; Tr. 30066-67.

Testimony (Aetna); Tr. 29422-23, 29429-34.

52. This evidence is material as showing that the reasons for the resignation of Lingeman and the discharge of Cree were not, as found, "failure to conform * * * to the pricing and marketing practices",[1] but Lingeman's ill health, their joint inefficiency and poor management, and the resultant heavy losses to the company.

53. The exhibits consist of contemporary correspondence between officials of the Aetna company as to its affairs and financial condition, a letter of Lingeman concerning his ill health (Pet. Ex. 1832), and reports and criticisms by certified public accountants retained by the company (Pet. Exs. 1831, 1846-1847). They were excluded generally as irrelevant and immaterial, with additional reasons assigned such as that no ground was laid for one of the accountant's letters (Pet. Ex. 1831), that some of the letters relating to mismanagement could be covered by testimony (Pet. Exs. 1972-1974) and that others were repetitious (Pet. Exs. 1985-1991). The testimony related to the result of an examination of the company books during

[1] Findings of Fact, par. 19(1).

the period in question and was excluded because the books were not produced.

Subject X

Railroads as source of land grant information.

Pet. Exs. 2253-2254 (Volunteer); Tr. 31823-27.
Testimony (Southwestern); Tr. 39018-20; offer of proof, Tr. 39019-20.

54. This evidence is material as showing that individual petitioners obtained information as to land grant rates (reduced rates on shipment of government owned goods) freely and independently from the railroads, both as an original source and in order to check their independent computations of such rates. It demonstrates the inaccuracy of the charges and findings that the rates are "highly difficult" and "generally impossible" to determine in advance, as "matter between the Government and the railroad".[1]

55. The exhibits consist of letters from a railroad, received in response to a petitioner's request, stating that the rates could be furnished without delay and advising as to the railroad personnel who had the information available. They were excluded on the ground that the writer was not produced and was merely expressing an opinion. The testimony which related to the accuracy of a petitioner's own computations and showed that it checked them with the railroads, was excluded under a general ruling of the Trial Examiner regarding such evidence, with the statement that it was "nothing but familiar information." Commission counsel stated, at the same time, "our evidence * * * showed right on the face * * * that the sources of their information were * * * the Government and * * * the railroads."[1]

Subject XI

Reasonableness of shipment distances and cross-hauling.

Pet. Ex. 1421 (Nazareth); Tr. 27980-81, 27985-90.
Pet. Ex. 2062 (Federal); Tr. 30491-94, 30497-98.
Testimony (Nazareth); Tr. 27993-94.

56. This evidence is material as showing the incorrectness of the finding of "much cross-hauling of cement",

[1] Complaint, Count 1, par. 7(d); Findings of Fact, par. 8(i).
[1] Tr. 39017-18.

and the unwarranted inference of resulting higher cost to consumers, which purports to be founded on the statement that "There is no way * * * of determining * * * how much of the total sums paid * * * for cement results from the additional cost of transportation."[2]

57. The exhibits consist of an analysis of a petitioner's shipment figures, prepared from office records in the regular course of business, showing that 80% of its shipments were within a distance of 125 miles from its mill (Pet. Ex. 1421), and a tabulation of another petitioner showing it shipped merely from 2-1/3% to 6% out of the state where its plant was located (Pet. Ex. 2062). One exhibit (Pet. Ex. 1421) was excluded on the ground that it was not prepared by the witness, although under his supervision, and that the supporting data was not available, although offered to be made so, notwithstanding a stipulation to permit the use of such tabulations, entered into between counsel, with the approval of the Trial Examiner, had been in existence since early in the hearings and had been the basis for the reception of a considerable body of the Commission's evidence (Tr. 1613-14). The related testimony was excluded on the ground that the same witness could not refresh his recollection from the exhibit. The other exhibit was excluded as unreliable on the ground that it had been prepared by a clerk under instructions of the witness, although its contents had been the subject of regular reports to the United States Bureau of Mines.

Subject XII

Independent action on specific changes in market practices.

(1) The "Lehigh" or "Dealer Service Payment" Plan (Dec. 1930-Jan. 1931).

Pet. Exs. 3023-3031, 3033-3034 (National); Tr. 39517-26.

(2) The "February, 1935" Sales Policy.

Pet. Ex. 1491 (Nazareth); Tr. 28260-63.

Pet. Ex. 2578 (Edison); Tr. 35753-55.

Pet. Exs. 3108-3110 (Medusa); Tr. 40170-72, 40182, 40185-86.

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[2] Findings of Fact, par. 23(c).

Testimony (Federal); Tr. 30698-700; offer of proof, Tr. 30700.

58. This evidence is material as showing petitioners' independent sources of information and non-collusive action in adopting and applying specific changes in their market policies, in like manner to their activities on price changes concerning which it has been found there was no systematic exchange of information.[1] The particular policies to which this evidence relates are cited in support of the findings of "uniformity of terms * * * of sale brought about by collective action,"[2] and of "agreements and understandings among themselves and with * * * dealers * * * to secure uniformity in their dealer policies."[3] The findings recognize "substantial dealer opposition" to certain marketing practices,[4] but fail to state its effect in rebutting the charge of collusion.

59. The exhibits, all of which are records kept in the regular course of business, consist of dealer publications and letters, and salesmen's reports, showing dealer disapproval of the "Lehigh" plan and threatened loss of individual petitioners' business, together with competitors' announcements of changes in policy received from dealers. (Pet. Exs. 3023-3031, 3033-3034); also office memoranda of instructions to salesmen showing the effect of competitors' announcements of their changes in policy, picked up in the field (Pet. Ex. 1491), and showing the broad latitude given to salesmen in determining to what extent, if any, certain announced policies should be observed (Pet. Exs. 3108-3110); together with correspondence showing a petitioner's refusal to participate in a proposed joint dealer-producer conference (Pet. Ex. 2578). The testimony was offered to prove that the "February, 1935" policy was changed as the result of dealer reaction and competitors' announcements of changes obtained from the field. The exhibits and testimony were excluded mainly as cumulative and a "waste of time" (Pet. Exs. 3028-3031, 3033-3034, 2578), with a statement by the Trial Examiner that "we are not to receive any more of these reports from the field

[1] Findings of Fact, par. 9(e).

[2] Findings of Fact, par. 14(a); see also par. 14(e) and Com. Ex. 1131-J as to the "Lehigh" plan.

[3] Findings of Fact, par. 17(a); see also par. 17(d), (e) as to "February, 1935" sales policy. Cf. Complaint, Count I, par. 7(e), (f).

[4] Findings of Fact, par. 14(e).

about the dealer reaction"[1] (Pet. Exs. 3023-3027). One was held to contain statements of opinion (Pet. Ex. 1491), and some were excluded as writings of third persons (Pet. Exs. 3108-3110).

Subject XIII.

Post-complaint matters on which commission was permitted to introduce evidence and respondents were not.

(1) F.o.b. Mill Bids or Sales.

Pet. Exs. 239, 241-247; Tr. 21416-18, 21901-02, 21904-05.

Pet. Exs. 2829-2834 (Southern States); Tr. 37588-89, 37592-93.

Pet. Exs. 3002-3003 (Southwestern); Tr. 39104, 39106-10.

Pet. Exs. 3165, 3170-3173, 3174-a, b, e-z3, 3175-3176 (Medusa); Tr. 40272-73, 40275-76; offer of proof, Tr. 40282-83.

Pet. Ex. 3659; Tr. 47677-80, 47682-84, 47686-87, 47688-701, 47704; offer of proof, Tr. 47684, 47687.

Testimony (Southwestern); Tr. 39107.

(2) Requests for Delivered Prices by States and Federal Government.

Pet. Exs. 1699-1701 (Southwestern); Tr. 28930-31, 28933-35, 28937-38, 28941-42, 28946; offer of proof, Tr. 28947-49.

Pet. Ex. 3434 (Monarch); Tr. 42269-76.

Pet. Exs. 3718-3719 (Glens Falls); Tr. 47902-05, 47911.

Testimony (Southwestern); Tr. 28949.

(3) Independent Action on Prepayment of Freight.

Pet. Ex. 3375 (Hawkeye); Tr. 41655-57.

Pet. Ex. 3430 (Monarch); Tr. 42246-47.

Testimony (Southwestern); Tr. 38939-40, 38970-71, 38974-75.

Testimony (National); Tr. 39539-40, 39599-600.

Testimony (Hawkeye); Tr. 41619-20, 41632-34, 41697-98.

Testimony (Monarch); Tr. 42195-96, 42200, 42218.

(4) Trucking Costs Greater than Rail.

Testimony (Penn-Dixie); Tr. 38152-55, 38217-18.

(5) Independent Action in Use of Equalization Clause on Bids to Government.

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[1] Tr. 39519.

Testimony (Lone Star); Tr. 32729½-31, 32734-35; offer of proof, Tr. 32735.

60. The materiality and nature of the evidence listed under subdivisions (1), (2), (3) and (4) of this subject have been discussed under Subjects II, V and VII, above.

61. The evidence under subdivision (5) hereof, with respect to use of the equalization clause on bids to the federal government, is material as showing the absence of uniformity among petitioners in their methods of bidding where land grant rates were involved, and the independent considerations which influenced their methods. It disproves the charge of "combination" in the use of "The control clause * * * by all producing respondents" bidding on such invitations,[1] and the related findings of "uniformity of action."[2] The testimony was offered to prove that the equalization clause was but one of various methods used in such bids, and that it was used, not as matter of policy, but because some government departments favored it and because it improved petitioner's competitive position. It was excluded as matter subsequent to the complaint.

62. As indicated by the subject-heading, all of petitioners' evidence listed above was excluded as post-complaint, despite the fact that the Commission was permitted to introduce post-complaint evidence in support of its claims on the identical subjects. Some illustrations of the resulting prejudice to petitioners are the findings of "records of cooperative activity among cement producers * * * continuing to the present time * * * with respect to practically every marketing procedure";[3] the conclusion that "the capacity * * * and effect of the combination * * * has been and is * * * to prevent purchasers from utilizing motor trucks * * * and from obtaining benefits which might accrue from use of such transportation * * *" and "to require * * * purchases of cement * * * on a delivered price basis * * *";[4] the finding that prepayment of freight was commenced by petitioners generally "some two years after the issuance of the complaint";[5] and the admission of such evidence as the government's indefinite "Good Friday"

[1] Complaint, Count I, par. 7(d).

[2] Findings of Fact, pars. 6(a), 8(k).

[3] Findings of Fact, par. 6(a).

[4] Findings of Fact, par. 26.

[5] Findings of Fact, par. 12(e).

f.o.b. mill invitation[3] as purported proof of "resistance" to f.o.b. mill bids, although its opening date was April 15, 1938, when the hearings herein were in progress before the Trial Examiner. The following incident typifies the inequitable treatment accorded to petitioners: early in their case the Trial Examiner ruled that he would not receive any further testimony on post-complaint transactions, and said he would entertain a motion to strike any such evidence that had been received "inadvertently."[4] Petitioners' counsel immediately moved to strike the "Good Friday" invitation and numerous other post-complaint exhibits of the Commission (Com. Exs. 1338-1412).[4] The Trial Examiner denied the motion saying: "Now, in regard to matter showing a continuance of a practice which is shown to have been employed prior to the complaint, that seems to me to be an entirely different matter."[5]

Subject XIV.

Fairness of price.

63. One of the most important and frequently recurring questions regarding the admissibility of evidence which arose during the hearings before the Commission concerned the relevancy of evidence of the reasonableness and fairness of cement prices and the costs, profits and losses of the corporate petitioners and the other respondent companies below.

64. The issue regarding fairness of price is presented in the complaint which is permeated with charges of inordinately high prices and the alleged existence of an artificial price level.[1] This issue is resolved against petitioners in the Commission's findings by statements regarding "high" and "artificial" prices and "price levels" and a "high degree of rigidity" and "higher prices".[2]

65. Notwithstanding the charge in the complaint and the subsequent findings on the subject, all evidence offered or attempted to be offered on behalf of petitioners to dem-

[3] Com. Ex. 1339.

[4] Tr. 28889.

[5] Tr. 28947.

[1] Complaint, pars. 8(b), (c), (e), (f); (j); 9(1), (4), (5).

[2] Findings of Fact, pars. 23(c), (e); 26; 18(a); 24)b).

onstrate that cement prices were not inordinately or unduly high and that they bore a reasonable relation to costs was rejected.

66. The record is replete with evidence offered and received on behalf of the Commission bearing on the subject of the reasonableness of cement prices. The Commission's proof on the subject began with testimony concerning the proposed government owned Tennessee Valley Authority cement plant and the negotiations of fifteen corporate petitioners located in the southeastern part of the United States with representatives of the TVA. The Commission's evidence related to cost estimates made by TVA and by certain petitioners and was designed to create the inference that the prices on cement submitted to TVA were unduly high in relation to the costs of production.

67. The initial efforts of petitioners to dispel these inferences by the introduction of testimony and contemporary documentary evidence showing the full details of the negotiations with TVA regarding the cost survey and detailed cost figures of petitioner Volunteer, one of the bidders, were successful. Objections by Commission counsel to introduction of such evidence were overruled by the Trial Examiner, at first, on the ground that, under the pleadings, reasonableness of price was material and that the evidence was calculated to rebut the Commission's evidence on the subject.

68. Subsequently however, Commission counsel asked leave to withdraw all of their evidence regarding the TVA cost survey and estimates and moved to strike all evidence theretofore received on behalf of petitioners on the subject (Tr. 32929-36). On this basis, over objection by petitioners, the Trial Examiner granted the Commission's motion and expressed his purpose "to eliminate the cost matter entirely from here on and from here back" (Tr. 32960). In view of the Examiner's ruling and in keeping with the purpose expressed by him, petitioners thereupon moved to strike specified evidence theretofore introduced by the Commission relating to the subject of fairness of cement prices and from which any inference adverse to petitioners on that subject could be drawn. In the alternative, if this motion should be denied, petitioners moved to reinstate their evidence which had already been stricken on motion of Commission counsel. The motion of petitioners to

strike was granted in part as to what might be termed direct evidence of unfairness of price but was denied in all other respects. This left in the record other evidence from which inferences might still be drawn on this subject. This situation is reflected in the Commissions' findings whereby inferences and suggestions, sustaining the allegations of the complaint in this respect as to alleged unreasonableness and artificial level of cement prices, purport to be based upon evidence in the record.

69. Following the TVA episode all evidence on behalf of petitioners on the subject of the fairness of cement prices or costs and profits was rejected. Included in this evidence, all of which is herein sought to be adduced, petitioners offered comprehensive surveys prepared at great expense by Price, Waterhouse & Co. and by Ford, Bacon & Davis respectively showing the profits and losses of 50 of the respondents below, covering the period from 1928 to 1937 and the reproduction costs of the respective plants of those petitioners. These were rejected as "irrelevant" (Tr. 47464). They are sought to be adduced now to rebut by direct evidence the inferences and suggestions that appear in the Commission's findings, in spite of the rulings of the Trial Examiner detailed above, as to the unreasonableness and the artificial level of cement prices.

70. Following are representative selections of the excluded evidence on this subject divided into 13 groups, and all of which is herein sought to be adduced.

(1) Survey of Costs and Profits of Petitioners by Messrs. Price, Waterhouse & Co.

Offer of proof, Tr. 47470-99; 47462-64, 47470-99, 47504.

(2) Survey of Reproduction Cost of Manufacturing Facilities of Petitioners' Plants by Messrs. Ford, Bacon & Davis.

Offer of proof, Tr. 47519-23; 47518-23.

71. This evidence is material as showing the absence of abnormally large profits in the cement industry, the wide differences in the average profits of various petitioners and the variations in profits among the respective petitioners from year to year. This evidence negatives the allegations in the complaint as to "high" base prices, the alleged nullification of the influence of cost upon prices, the alleged "artificial" price level and "disappearance"

of prices arrived at through free competitive forces,[1] together with the statements in the findings to like effect.[2] This evidence is also material along with other direct evidence of petitioners to show that there is no combination as alleged in the complaint and the low profits shown support the contention of petitioners that prices for cement are highly competitive.

72. The Price, Waterhouse survey covers net investments and net earnings for the period 1928 to 1937 based on an examination of the records and tax returns of fifty of the respondents below, including many of the corporate petitioners herein, whose plants represent 80% of the total productive capacity of all the manufacturing petitioners. The survey discloses an average return on the respective investments of these companies of 3.56%, before deduction of federal taxes, and of 2.99% after taxes, as compared with an average interest rate of 3.31% on United States Government obligations during the same period. It discloses further the following variations in profits and losses of the 50 petitioners: 12 lost money, 2 earned under 1%, 8 earned between 1% and 2%, 7 between 2% and 3%, 6 between 3% and 4%, 6 between 4% and 7%, and the remainder between 7% and 10% except for one which earned slightly more than 12%. The records examined in the course of the survey were offered to be made available to the Commission for its examination. The survey was excluded, as previously indicated, on the ground it was irrelevant.

73. The Ford, Bacon & Davis survey, which was an integral part of the picture covered by the Price, Waterhouse survey, was based on an examination and valuation of the plants and equipment of the same fifty companies showing the total reproduction cost for their 121 plants, as of January 1, 1938, to be $441,236,650. This reproduction cost new was found to be much greater than the net investment figures (actual cost without depreciation) on which the net earnings, profits and losses were computed by Price, Waterhouse. Thus, the profits shown on the Price, Waterhouse survey would be substantially diminished if the more accurate reproduction cost new, basis were used. The Ford, Bacon & Davis survey was excluded for the same reason as the Price, Waterhouse survey.

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[1] Complaint, Count I, pars. 8(b), (c), 9(1).

[2] Findings of Fact, pars. 23(c), (e), 26, 18(a), 24(b).

(3) Cost Data and Explanation of Negotiations Relating to Proposed Tennessee Valley Authority Cement Plant. Pet. Exs. 2190, 2194-2197, 2201, 2202 A-D, 2203-2204 (Volunteer).

Testimony, objections, rulings and colloquy: Tr. 31433-50, 31478-504, 31515-71, 31587-649, 31657-64, 31668-69, 31676-81, 31693-98 (Volunteer).

Motions and rulings on the above exhibits and testimony: Tr. 31510, 32929-36, 3238-39, 32957-65, 33883-87, 33889, 33892-94, 35947-49, 35950-57, 35968, 35970, 36081-83, 38847-51, 39467-70, 40684-85, 41456-58, 48567-68, 48647.

74. This evidence, as already noted, is material as showing the fairness of the prices bid on the Tennessee Valley Authority projects concerning which there is abundant evidence introduced by the Commission. It destroys any basis for the inference urged by the Commission that reduced prices on the second large TVA project indicated that the prices on the first project were unreasonable or excessive as alleged in the complaint[1] and suggested in the findings. This evidence also shows that the reduced prices were the result of concessions by the bidders even at grave risk of heavy losses in the face of a mandate by TVA to accept those prices or else TVA would build a government plant. This new plant would have been in an area where existing capacity already far exceeded demand.

75. The evidence also shows the independent action of the participating petitioners and the absence of connection between the Institute and their activities and negotiations in conjunction with TVA. It shows further that the identical prices bid on the project, which are cited in the findings,[2] were not the result of "combination" or of a "pricing system." Finally, it shows the detailed activities of petitioner Volunteer throughout the negotiations, its independent action, its exhaustive study of the problems presented and the free access to its plant and records which it gave TVA for purposes of cost analysis.

76. The evidence sought to be adduced regarding TVA consists of written statements, analyses and stipulations showing the extra cost of type "B" cement called for in TVA invitations (Pet. Ex. 2190); the cost to petitioner Volunteer of manufacturing cement for the project (Pet.

[1] Complaint, Count I, par. 8(j).

[2] Findings of Fact, par. 9(b), Com. Ex. 401.

Ex. 2194); the increase in labor, supply and operational costs due to the N.R.A. program (Pet. Ex. 2195); the cost of construction of, and production by, the proposed government plant (Pet. Ex. 2202); and comparison of the TVA's cost estimates and the estimates of the participating petitioners (Pet. Ex. 2203, 2204). It consists also of reports on conferences with representatives of TVA (Pet. Exs. 2196-2197) and the fully documented report, findings and conclusions concerning the proposed government plant which were submitted to TVA by a technical committee acting for the interested petitioners (Pet. Ex. 2201).

77. All of the foregoing exhibits were contemporary records prepared and used during and in the course of the negotiations and identified by the person who prepared them or participated in their preparation and matters to which they related. All but Pet. Ex. 2190 had been received in evidence but were subsequently stricken on motion of the Commission's counsel already referred to.

(4) Comparison of Cost of Cement and Other Commodities, Including Building Materials.

Pet. Exs. 2527-2529 (Universal Atlas Cement Company); Tr. 35312-15, 35318, 35321-27.

Pet. Exs. 3741-3742; Tr. 47960-64.

Testimony, Tr. 36759.

78. The foregoing evidence consists in part of a tabulation and graphs (Pet. Exs. 2527-2529) comparing the wholesale prices of cement and other commodities including building materials, for the period 1913 to 1938. These tabulations were prepared from statistics of the United States Bureau of Labor and the United States Bureau of Mines, and show cement prices to have been as low or lower comparatively than those of other commodities. The sources of information from which these exhibits were prepared were available at the hearings. They were excluded on the ground that they related to the reasonableness of cement prices, that the Commission did not introduce evidence of unreasonably high prices of cement as a "symptom of monopoly" and that they would broaden the inquiry too much. The same exhibits show that the wholesale prices of cement were as variable or more variable than the prices of other commodities and are discussed further under Subject XVI, *infra*, in connection with the non-rigidity of cement prices.

79. Other evidence in this group consists of tabulations based on United States Department of Commerce census statistics for the construction industry in 1929 showing that the cost of cement represented but 3% of the value of all construction business and showing the correspondingly small percentage of the value of cement in particular fields of construction (Pet. Exs. 3741-3742). These tabulations serve to demonstrate the inaccuracy of the allegation in the complaint that petitioners "have so acted in combination as to constitute an influence prolonging the depression".[1] The tabulations were excluded on the ground that judicial notice could be taken of the census statistics on which they were based and that the tabulations themselves could be presented in briefs.[2]

80. The excluded testimony in this group was that of a building supply dealer with respect to how the price of cement compared with other building materials. This was excluded as relating to the reasonableness of price.

(5) Tabulations of Cement Shipments Showing Relation of Costs to Volume and Marginal Returns.

Pet. Ex. 2397 (North American); Tr. 33826-31.

Pet. Ex. 2406 (Peerless); Tr. 34186-91, 34193-95, 34197-98.

81. This evidence consists of (1) a chart which shows: the approximate relation of the operating profits of petitioner North American to the volume of its shipments and to its selling prices during 1935 and 1936; the basis for determining the extent to which the company can shrink its mill nets (or absorb freight); and the proportionately increasing sales which would be necessary in order to realize an operating profit as mill nets are reduced (Pet. Ex. 2397); and (2) a tabulation showing the volume of shipments of petitioner Peerless from 1927 to 1939, the change in its cost per barrel in relation to fluctuating volume and showing continual reduction of the company's costs (Pet. Ex. 2406).

82. The chart concerning petitioner North American was prepared in the usual course of business as a policy guide to the company. It was objected to first for lack of the basic data, but the said data was produced. It was excluded as irrelevant although previously the Examiner

[1] Complaint, par. 8(d).

[2] Tr. 47962-63.

had asked the witness whether he could approximate the mill net which would be realized on particular sales in deciding whether to undertake such sales (Tr. 33824) and the chart was a complete answer to that question and showed the method used by the company in such approximation.

83. The tabulation concerning petitioner Peerless was excluded because of an objection that the supporting data was not produced (in contravention of the stipulation already referred to above), although petitioners' counsel stated the data was available for checking by Commission counsel and the shipment figures in the tabulation agreed with those sent to the United States Bureau of Mines.

(6) Increases in Selling and Production Costs Since 1933.

Testimony (Superior); Tr. 29610-11.

(7) The Element of Storage Costs.

Testimony (Federal); Tr. 30486-89.

(8) The Cost of Construction of a Government Cement Plant at Puerto Rico.

Testimony (Volunteer); Tr. 31367-73; offer of proof, Tr. 31372-73.

(9) The Extra Costs of Producing Cement for the Tygart River Dam.

Testimony (Bessemer); Tr. 32322-26, 32328-31; offer of proof, Tr. 32330-31.

(10) The Effect of Increased Specifications on Costs.

Testimony (Volunteer); Tr. 31412-13; offer of proof, Tr. 31412-13.

(11) The Effect of Periods of Operations of Mills on Costs.

Testimony (Bessemer); Tr. 32061-62.

(12) The Submission of Company Ledgers and Profit and Loss Statements to the State of Illinois.

Pet. Exs. 1030-1035 (Alpha); Tr. 25645-46, 25651-58.

(13) Losses Sustained by Particular Petitioners.

Testimony (Lawrence); Tr. 8211, 48567, 48647.

Testimony (North American); Tr. 8266, 48568, 48647.

Testimony (Lehigh); Tr. 26897, 26901, 48568, 48647.

Testimony (Superior); Tr. 29559-65, 29575-82, 48568, 48647.

84. The evidence described in (6) to (13) above consists of testimony showing the following: that increases in cement costs since 1933 have been due to increases in wages, materials, equipment and taxes (Tr. 29610-11); that storage and other costs in the production of cement are high (Tr. 30486-89); that the construction of a cement plant requires an investment or capitalization of between $3.50 and $4.00 per barrel of annual capacity as established by the testimony of a consulting engineer for the federal government on the government's Puerto Rico plant and not merely between 50¢ and $1.00 per barrel of annual capacity as previously estimated by one of the witnesses for the Commission (Tr. 31367-73, 501-02, 922); that the federal government received a fair price on the Tygart River Dam letting on which cement was sold to it at commercial prices despite extraordinary expense of manufacturing, storage and testing necessitated by the government's special requirements, and that commercial prices have not been increased despite the continual increase in the cost of manufacturing ordinary cement attributable to increased specifications (Tr. 32322-26, 32328-31, 31412-13); that the inability of cement producers to operate throughout the entire year has a bearing on production costs and the price level of cement (Tr. 32061-62); and that several petitioners have operated at a loss for a number of years due to the low price level of cement (Tr. 8211, 8266, 26897, 26901, 29559-65, 29575-82). This evidence also includes correspondence and other records showing that the State of Illinois accepted an offer of petitioner Alpha for the examination of the books of said petitioner made for the purpose of demonstrating the fairness of said petitioner's prices (Pet. Exs. 103-105). All of this evidence was excluded on the ground that costs were irrelevant to the issues in the case. Petitioners' counsel requested that counsel for the Commission stipulate that there was no issue of reasonableness of price on the Tygart River Dam letting in connection with which the Commission had introduced in evidence an abstract of petitioners' bids (Com. Exs. 178A-C). The stipulation was refused by Commission counsel who stated, "we contend Tygart River bidding was non-competitive" and "a non-competitive price is inherently unreasonable" (Tr. 32326-28).

Subject XV

Expert Economic Testimony.

(1) Harmful Effects of Lack of Self-Restraint in Pricing and Marketing Methods.
Tr. 45536-38; offer of proof, Tr. 45536-37.

(2) Comparison of Basing Point and Alternative Marketing Methods Showing the Natural Development of the Basing Point Method and the Benefits therefrom.
Tr. 44248, 44252, 44254, 44258-63; offer of proof, Tr. 44258-63; Tr. 45542-43; offer of proof, Tr. 45543.

(3) Disadvantages of Uniform f.o.b. Mill Pricing Method.
Tr. 45608-11; offer of proof, Tr. 45610-11; Tr. 45897, 45899-901; offer of proof, Tr. 45900-01.

(4) Normalcy of "Cross-Hauling" and "Dumping" and Obstacles Preventing Their Elimination.
Tr. 45549-50, 45566-67, 45569; offer of proof, Tr. 45550, 45569.

(5) General Observance of Policy Against Diversions for Over 20 years does not signify Collusion.
Tr. 44690-91; offer of proof, Tr. 44691.

(6) Importance of Ratio of Net Profits to Actual Investment Costs as Indicating Existence of Competition.
Tr. 45451-52; offer of proof, Tr. 45452; Tr. 45558-60; offer of proof, Tr. 45559.

(7) Refusal by the Trial Examiner to Hear Further Economic Testimony on Behalf of Petitioners.
Tr. 46260-64; offer of proof, Tr. 46262-64.

85. This evidence is material as supporting the defense in petitioners' answer that the method of marketing cement which is in general use today is maintained "on the foundation of custom, experience and the best interests of all concerned in the production, sale and use of cement".[1] The evidence serves to demonstrate the incorrectness of the inferences in the findings of "a non-competitive or monopolistic price structure" and "restraint upon competition by respondents".[2]

86. The testimony concerning the effects of lack of self-restraint in pricing and marketing methods was ex-

[1] See Answers to Complaint.

[2] Findings of Fact, pars. 6(c), 22 (c), 23(f), 24(b).

cluded as too vague; testimony comparing the basing point and alternative marketing methods was excluded on the ground that it was not relevant to the issues in the case; testimony with respect to the disadvantages of a uniform f.o.b. mill pricing method was excluded as too speculative; testimony with respect to the normalcy of cross-hauling and "dumping" was excluded as mere opinion regarding other industries and irrelevant; testimony concerning the significance of the long existing policy against diversions was excluded as covered by prior testimony; testimony with respect to the importance of the ratio of net profits to actual investment in determining the existence of competition was excluded as irrelevant and immaterial and on the further ground that there was no definite information in the record concerning such ratio. The refusal to hear further economists on behalf of petitioners was for the stated reason that it would be cumulative and because there was not "any more time for that feature of the case" although petitioners were operating within the time limit agreed upon between their counsel, counsel for the Commission and the Trial Examiner.

Subject XVI

Non-rigidity of Cement Prices.

Pet. Ex. 2526 (Universal Atlas Cement Corporation) Tr. 35303-04, 35308-11, 35348-49, 35354, 35355-57.

Pet. Exs. 2527-2529 (Universal Atlas) Tr. 3741-42, 47960-64.

87. The evidence consists of a tabulation of all cement price changes at fourteen representative cities over a period from 1926 to 1938 (Pet. Ex. 2526) and a tabulation comparing the wholesale prices of cement and all other commodities, including building materials, for the period from 1913 to 1938, using 1926 as the basic year (Pet. Ex. 2527), together with graphs illustrating the latter tabulation (Pet. Exs. 2528-29). The tabulation of price changes, which was made from records kept in the regular course of business, shows such changes to be numerous and widely scattered. It was excluded despite the existing stipulation regarding the use of such tabulations already referred to. The ground for exclusion was that it was impossible to produce an individual official of the company who could testify to all of

the prices over the twelve year period and because the massive supporting data was not offered, although the obvious aim of the stipulation was to meet such objections, and although counsel for the offering respondent below stated his willingness to make the data available for checking.

The tabulation comparing wholesale prices (Pet. Ex. 2527) shows that cement prices are generally as variable or more variable than those of other commodities. This tabulation and the related graphs were excluded on the grounds that they related to the reasonableness of cement prices, that the Commission did not introduce evidence of unreasonably high prices of cement as a "symptom of monopoly" and that they would broaden the inquiry too much. Counsel for the offering respondent below expressed his willingness to withdraw the offer if Commission counsel would stipulate that rigidity of prices was not in issue in the case. Commission counsel declined to so stipulate and, on the contrary, replied "there is evidence of rigidity in the record, and we put it there because I think an inference logically can be drawn from it as to the reasons for such rigidity" (Tr. 35318). The tabulation and graphs comparing wholesale prices were prepared by the witness from statistics of the United States Bureau of Labor and the United States Bureau of Mines and such material was available at the hearings.

Wherefore, deponent prays that the relief requested herein be granted.

George S. Leisure.

Subscribed and sworn to before me this ..... day of March, 1944.

Dorothy J. Norton,
Notary Public, Kings County.

(Seal)

Kings Co. Clk's No. 116 Reg. No. 25N5
N. Y. Co. Clk's No. 25 Reg. No. 28G5
Commission Expires March 30, 1945.

APPENDIX "A".

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Offers of Proof.

(Tr. 23807-09)

Mr. Leisure: In view of your Honor's ruling as to this line of testimony, I desire to make an offer of proof at this time, and I offer to prove by this witness, if allowed to do so, that the all rail rate from the Alpha Company at Alsen to Jamaica is 57 cents; that the total water rate, which includes water and rail together, is 59 cents.

I also offer to prove that the total all rail rate from the same point to Windfield is 57 cents; whereas the total water rate including the rail rate necessary to use the water is 59 cents.

I also offer to prove that from the same point of the Alpha Company to East New York the all rail rate is 57 cents; whereas the water rate from the same point is 55 cents.

To Hammel the all rail rate is 65 cents, the water rate is 64 cents.

* * * I offer to prove that the all rail rate to Hollis is 57 cents; whereas the water rate is 64 cents; that the rail rate to Hempstead is 65 cents; whereas the water rate is 67 cents; that the all rail rate to Queen's Village from the same point is 57 cents; whereas the water rate is 64 cents; to Woodmere is 65 cents by rail, and 64 cents by water; to Port Jefferson the rate by rail is 68 cents; by water it is 75 cents; to Manhasset by rail it is 65 cents, by water 64 cents. To Jamesport it is by rail 80 cents, and by water it is 80 cents. To Forest Hills the rate by rail is 57 cents; by water 59 cents. To Huntington by rail it is 68 cents, by water 72 cents. To Sayville by rail it is 68 cents, by water it is 75 cents. To Floral Park by rail it is 68 cents, by water 72 cents.

* * * and I offer to prove that as the result of this compilation we want to show on the motion that it costs this company more to ship by water than it does by rail.

(Tr. 27566-67)

Mr. Leisure: * * * I offer to prove by the documents tendered in evidence that this witness received those documents from his trade, and I have selected—in order to cut down the record—I have selected just a few as typical of what he does receive in his trade. I have not attempted to offer all of the letters that he received.

I offer to prove by those exhibits in documentary form the requests and the prices which he received from his customers on which his policy of quoting at destination is based.

(Tr. 28847)

Mr. Withrow: Your Honor, I want to make an offer of proof with reference to Respondents' Exhibits 1670 through 1687, inclusive, to the effect that if these documents were admitted, and the witness allowed to testify from them, that they would show that he relied upon these papers in making a price change in December, 1936, and he did not get the information from his competitors, and would negative any allegation, inference, or charge that this Respondent was in any conspiracy or agreement with any competitors with respect to this change in price.

(Tr. 28947-48)

Mr. Withrow: * * * your Honor, we offer to show through Respondents' Exhibits 1699-A and B, 1700-A and B, 1701-A and B, 1702-A and B, 1703-A and B, and 1704-A and B, that the State of Ohio, a purchaser of Portland cement, continued to request bids for Portland cement only on an f.o.b. destination basis, and to show that this Respondent continued to comply with the request of that purchaser of Portland cement, and that it continued after the complaint to fill in the prices bid to the State of Ohio from the price cards found in its files.

(Tr. 28949)

Mr. Withrow: Your Honor, as a result of your Honor's ruling on our proffer of exhibits showing invitations and the manner in which the Southwestern Company, at Osborn, Ohio, made bids to the State of Ohio, I am not having marked certain documents here, but I do offer to show through these documents, being three specific invitations from the State of Kentucky, that the State of Kentucky has continued to ask for f.o.b. destination bids since the issuance of the complaint in this case, and that this Respondent has continued to make its bids to the State of Kentucky on the basis requested, and that it continues to fill in the prices on its bids from the price cards contained in its files, and I have here—and were it not for your Honor's ruling I would have marked as exhibits in this

card the price cards for these specific destinations involved.

(Tr. 29786)

Mr. Withrow: Your Honor, I offer to prove through this chain of exhibits, Respondents' Exhibits 1861, to 1867, inclusive, that this Respondent had on occasions prior to its bid of June 12, 1936, to the United States Industrial Reformatory at Chillicothe, Ohio, bid a price of $2.02 for cement at that destination, and had received orders for cement at that price on two occasions. And, I further offer to prove through these documents, that this company bid on June 12, 1936, in accordance with Respondents' Exhibit 1867-A and B, a price to the U. S. Industrial Reformatory, qualified as contained on that exhibit, and that as a result of more advantageous terms and conditions of sale, was awarded the contract on that invitation, and the Respondents' Exhibit 1865 showing that they were requested to ship the cement by the Department of Justice, it appearing from the exhibits already offered on behalf of some of the other Respondents that the terms, as evidenced by these papers of this company, in connection with this bid, were more favorable.

(Tr. 30066-67)

Mr. Withrow: Your Honor, I offer to show through these documents that this witness communicated with, and received communications from, officers, including the president of the Aetna Portland Cement Company, concerning a price advance initiated by this witness' company December, 1936; and further showing that the question of Aetna's increasing the price had been discussed and was being discussed between the officers of the Aetna Company going back to the original employment of this witness and the reasons therefor; and further that this witness informed his salesmen and other employees of the Aetna Cement Company concerning this change, of what the change amounted to, the reasons for making the change, and the effect that the amount of the change would have; and further showing that the Aetna Company issued instructions to all salesmen requesting them to follow the prices being quoted by competitors to determine whether or not those competitors would meet the price increase made by the

Aetna Company, and also further showing that the Aetna Company requested that information be sent in by the salesmen concerning the general reaction among the dealer and customer trade concerning this matter of an increase in price.

(Tr. 30700)

Mr. Withrow: * * * I offer to prove that at and subsequent to the issuance by the Federal Portland Cement Company of its February 23, 1935, announcement, being Respondents' Exhibit 2131-A and B, dealer-customers of this witness talked to this witness about that policy, and expressed concern and complaint that they were losing work, that which the dealers normally did, because the work was then being carried on by relief agencies of the Federal Government; that the dealers said they thought they were entitled to handle such work, and as a result of this, these complaints by dealers, and the announcement by a competitor of a sales policy which turned over this class of business to the dealer, this company issued its announcement on April 10, 1935, being Respondents' Exhibit 2135-A and B.

(Tr. 31372-73)

Mr. Werle: We offer to prove, through this witness, that the original estimate which this witness made of the cost of that plant was $848,242 plus $55,000 freight on materials, or a total of $903,242 * * * that in terms of per-barrel cost that would be $2.57 per barrel on the basis of a 360,000-barrel plant.

That this cost estimate did not include several important items, which were land, the actual value of which, and the actual cost of which was $35,000; a main railroad spur, actual cost $23,000; a substation, actual cost $25,000; and organization cost which was estimated at $40,000.

Furthermore, that that estimate did not include any working capital, and that the total over-all original estimated cost, including those items, would have been $2.85 per barrel.

That, furthermore, it included no profit for the general contractor, and certain other miscellaneous items of cost.

Then, your Honor, in view of your ruling, and having that foundation testimony for the witness, I offer to prove through this witness that the final total construction cost per barrel of that mill was between $3.50 and $4.00 per barrel.

(Tr. 31412-13)

Mr. Werle: In that connection I offer to prove, through this witness, that the finer grinding required to meet these competitors' characteristics which are found in other cements does increase costs, has a direct effect on the labor and power costs, and on the cost of supplies, because the rate of grinding goes down and the unit cost goes up.

Further offer to prove, through this witness, that although increased costs have been incurred in that connection from time to time, the company has not increased its prices, and the reason that the company did not increase its prices was that it could not get any more for its cement when it did exceed these characteristics of other brands, that the buyer would not pay more for one brand than he would another.

(Tr. 32141-42)

Mr. Withrow: Your Honor, I was going to offer to prove certain contents of Respondents' Exhibits 2295 through 2304, which, I think, if your Honor would examine them you would admit since they are material and relevant, but I won't extend my offer in the record.

Trial Examiner Norwood: Go ahead.

That gives you an exception on all invitations. They are offered here to show that the Government, or anybody else, requested delivered prices.

(Tr. 32287)

Mr. Withrow: Your Honor, I offer to prove through this witness that the dealer-customers of the Bessemer Portland Cement Company have from time to time discussed the question of their attitude towards trucking with the employees and officers of the Bessemer Company, and that such dealer-customers have expressed a dislike to the problem, the question of trucking, and are opposed to it, except under certain emergency situations, on the grounds already stated by the witness; and, on the further grounds

that the dealers are afraid that an increase of the existence of trucking would tend to eliminate the existence of the cement dealers.

(Tr. 32330-31)

Mr. Withrow: I offer to prove through this witness that it cost the Bessemer Portland Cement Company more to manufacture the special cement for Tygart River Reservoir Dam than to maunfacture an equal amount of standard Portland cement; that the servicing of that job entailed additional expense in the form of tying up large storage equipment as necessary for testing the cement and keeping a large supply of tested cement on hand which represented invested capital, together with additional expenses resulting from the fact that the equipment in the mill and the storage space had to be especially cleaned before the tested cement was made in order for the tested cement to meet the specifications; and, further, that all of these matters enhanced the cost to the Bessemer Limestone and Cement Company in connection with its supplying cement under contract received for Tygart River Reservoir Dam.

(Tr. 32735)

Mr. Brick: I offer to prove through this witness, if permitted so to do, that the Lone Star Company used the equalization clause as described in other parts of the record; that they did so because some of the Government departments looked upon it with favor; but they did not adopt its use as a matter of policy, and used it only in connection with those proposals where they thought its competitive position would be better through its use.

(Tr. 32826-27)

Mr. Brick: * * * I offer to prove in that connection that the Lone Star Company increased prices by quoting price advances to its trade in March of 1933, and that those advances were not followed by the competition; that it was necessary for Lone Star to recede from its position and to sell at its old price rather than the advanced price; and that similarly Lone Star had other such situations; for instance, one in which it increased the sack charge from 10 cents to 15 cents, and none of the competition followed, and it was

necessary for Lone Star to continue the 10 cents' sack allowance.

(Tr. 35702-03)

Mr. Werle: We offer to prove through this witness, if your Honor please, that the Edison Company in the past has made occasional boat load deliveries, that water movement of that character was rather heavy, to about five or six years ago, and there was some, perhaps, demand for that kind of business; that in more recent years the trend has been entirely toward rail movement; that the reason for the falling off in demand is that movement by boat has to be in very large quantities, and that the customers have not been taking cement in those quantities in the time of depression; that the size of the boat loads when this company did make some such deliveries ranged from a thousand to three thousand barrels per delivery; that the cost of getting the cement to the point of use in such cases, in this limited experience, has been greater than the cost of getting this cement there all rail; that this company, on the other hand, has never been able to charge the customer a price which included this increased cost because it had to meet the lower competitive prices found at the market place.

I would say, furthermore, in that connection, that this company has never refused any request of any customer for that kind of delivery; that this company has not made any effort to discourage that kind of delivery; and that in such instance, your Honor please, that is about the gist of the proof.

(Tr. 37171-72)

Mr. Seeley: I offer to prove, your Honor, that the witness representing the Missouri Portland Cement Company, a Respondent in this proceeding, had occasion in the regular course of business, prior to the institution of this proceeding, to consult its customers concerning its policy of quoting prices, and that it did consult them, and that it did ascertain what the attitude and inclinations of those customers were, and that on the basis of that information and other information which it had in the regular course of business it has continued to follow the practices which have been the practices of this company ever since it has been operating with respect to its method of quoting cement;

and I offer to show further that this witness ascertained with respect to its customers that both its dealer as well as its contractor customers were approached in this matter and notified this witness as to their desires and stated that they wanted to know what cement would cost them at destination, and were not interested in quotations f.o.b. plant.

I offer to show that this witness does not sell at the mill to these customers because it has found that the market is not at its mill, and that those customers are not interested in buying cement f.o.b. plant, and that those customers represent the great bulk of its business.

(Tr. 37582-83)

Mr. Werle: That since this Procurement Division invitation is only one branch of the Government that has been asking for f.o.b. mill prices at all, and that is the Alabama Office of the Procurement Division, that the other Procurement Offices from whom this Respondent receives invitations have been calling for destination prices, and that the f.o.b. mill matter is the exception, rather than the rule, in the area where he sells.

(Tr. 38123)

Mr. Brick: Well, I offer to prove in that connection that the principle adopted by the Interstate Commerce Commission in the determination of these various mileage scales appearing on that exhibit included two points, one, reasonable compensation to the railroads; and, two, the elimination of discrimination as among shippers.

(Tr. 38912)

Mr. Withrow: Well, I offer to prove through this witness that the Southwestern Company made a survey of their mill with reference to the problem of installing adequate facilities for loading trucks, and they found that it would cost in excess of sixty or seventy thousand dollars to erect a new pack house and loading platform; and I further offer to show through this witness that the volume of truck business af their mill is not large enough to support such an investment.

(Tr. 39019-20)

Mr. Withrow: In view of your Honor's ruling, I would like to offer to prove, through this witness, that the Southwestern Portland Cement Company has found that the land grant rates calculated by its traffic department, and checked with the railroads, have usually been found to be correct and the same as that calculated by Government rate clerks; that there have been a few occasions where different rates were reached, but that no determination was made in those cases as to which, whether the Government or the Southwestern Company employee, was correct; that the Southwestern Portland Cement Company, in the matter of land-grant rates, attempts to check the rates calculated by its own traffic department with the rate information which it can secure from the railroads which serve its plants, and also with the land-grant rates employed by the United States Government in making settlement on previous invitations and bids to the Federal Government.

I further offer to prove, through this witness, that in the event a discrepancy or difference is found between the rates obtained by the Southwestern Portland Cement Company from various sources, the Southwestern Company employs for all purposes, the lowest rate, thereby giving the Federal Government any advantage which might accrue.

(Tr. 40216)

Mr. Withrow: Respondents' Exhibit 3148-A was offered to show that the Lone Star Company attempted to increase prices out in the territory surrounding York, Pa., that the Medusa Company did not follow the increase and continued to sell at its previously quoted prices which were lower.

(Tr. 40282-83)

Mr. Withrow: Your Honor, in view of your Honor's ruling rejecting the balance as cumulative, I will not have marked at this time this file of f.o.b. mill bids which include bids to the quartermaster's office, the C.C.C., the Department of Agriculture, the Department of the Interior, and other branches of the Federal Government to whom the Medusa Company has made f.o.b. mill bids, with the statement that they would show that under conditions similar

to the invitation just received, the Medusa Company has bid f.o.b. mill bids—made f.o.b. mill bids in other instances.

(Tr. 44258-63)

Mr. Bond: Then, if your Honor please, we offer to prove through the witness on the stand as a qualified economic expert that in determining whether competition is lessened or has been lessened in this industry by the marketing methods as stated in the hypothetical question to him; referred to as the long hypothetical question, he considers it a proper, and under the conditions, a necessary approach to compare the competition under the facts assumed with what it would be under any of the possible or to him conceivable methods of marketing which would be applicable to this industry; that he considers that possible alternative methods of marketing can be used by such comparison are principally two: First, the marketing through some recognized central market or series of central markets organized and having machinery for carrying on trade in cement at those points; and, secondly, by the selling of cement by each individual plant entirely at its own doors at uniform f.o.b. mill prices.

That in addition, as a third possible alternative, he considers there is the possibility of placing a limitation on the amount of freight absorption, and for this, in his opinion, legislation would be necessary.

That in his opinion, on the matter of selling cement through a series of central exchanges, in view of the fact that cement, because of the heavy relative cost of freight, rarely moves over perhaps 300 miles, there would be a need for more central markets, a large number of central markets for this type of commodity, and more than for the commodities where central markets are used, such as grain and cotton markets, and the five stock markets; that in these latter cases the product frequently moves much larger distances, both from source of origin to central market, and subsequently from the central market to the point of consumption, those distances indicated in the assumption in question, which he would answer, and for this reason he sees the necessity for a very large number of central exchanges if this method of selling were to be adopted;

That in the opinion of the witness as an expert he considers that there would be certain disadvantages involved

in the selling of cement through central exchanges that these disadvantages would be measured both in terms of cost and in terms of a change in the personal relations between the buyers and the sellers; that these additional costs that would be involved would include the cost of operating the market, plus in all probability a greater increase due to brokerage fees than could be offset by reductions in the cost of the seller's marketing organization, and that in his opinion the change in personal relations between the buyers and sellers would result in somewhat less satisfactory service to the buyer in terms of promptness of delivery and similar relations, and would also be likely to result in less accurate and timely information reaching the producer as to the probable demand immediately following the fiscal period, and that these would in turn make economic operations and the planning of operations more difficult;

That in his opinion if these central exchanges were thus used for the sale of cement they would inevitably, or almost inevitably in this case become basing points for the computation of prices;

That in his opinion as a student of these central exchanges that do exist, he would not expect that all transactions in cement would take place on the floor of such central exchanges, because in the central exchanges that do exist all transactions do not take place on the floor, and he sees no reason, therefore, why it should be expected in the case of cement;

That with such central exchanges he would naturally expect that each company would maintain a force of salesmen, that these would solicit the trade in much the same manner that they do at the present time, although perhaps with some modifications;

That in considering whether this method of marketing would result in any savings on sales expenses he doubts very much if such central exchanges would lessen the sales expenses of the different individual companies;

That, having in mind the fact that freight has, in our long hypothetical question, been assumed to be an important element in the delivered cost of cement, and assuming further that the cement would not physically move to the central market or exchange, then under those conditions it would in his opinion be necessary in each instance for the buyer to know the location of the cement that he was purchasing on the floor of such a central exchange unless some

complicated system could be worked out by which the sales could be made on a delivered basis even though the cement was not physically brought to the central market. This would be extremely difficult to do, namely, to work out a system of delivered prices, and would probably be impossible if the central markets involved in speculative future trading in cement.

That in his opinion if the cement were marketed on such central exchanges only after first transporting the cement to such exchanges, that this would unquestionably involve waste both in back hauling to the point of use as well as in handling and storage, because, in many instances, in his opinion, there would be either direct back hauling or else what he would describe as dog-leg hauling that could have been avoided by direct shipment from the plant to the point of consumption;

That in his opinion, therefore, cement is not a product which can advantageously be marketed through one or more central exchanges;

That he believes that such a system of selling through central exchanges would be cumbersome and expensive and not feasible;

That if it were thus sold on central exchanges in his opinion the effect on cost to the ultimate consumer would be that the price to the consumer public would be raised;

That he reaches this opinion because if the cement actually moved to the central market and thence back to the consumers there would be the additional freight and the loading and storage costs that he has previously stated, and if it were not first moved to the central market there would be additional costs for the operating at central markets. He believes that these factors would tend to raise the cost to the ultimate consumer.

Turning then to the matter of uniform f.o.b. mill selling, the witness would state that he understood by such a proposal that it would essentially be a method of selling——

(Tr. 44691)

Mr. Bond: I offer to prove through this witness as an expert economist that in his opinion the fact that for more than 20 years cement manufacturers have generally attempted to prevent such diversions does not indicate to him collusion, and that in his opinion it is equally consistent with competition.

(Tr. 45452)

Mr. Bond: Well, I offer to prove, then, by this witness that in his opinion as an expert economist he would in considering the indicia, so-called, of competition regard the ratio of net profit to actual investment as the significant factor for consideration rather than the ratio of profit to sales.

—o—

(Tr. 45536-37)

Mr. Withrow: I offer to prove through this witness, if he were permitted to testify, that the want of self-restraint by an individual producer in competition results in selling without regard to costs and results in cut-throat competition, resulting in ultimate failure for all but the lowest-cost producer, and perhaps even failure for him, inasmuch as under the hypothesis of selling without reference to self-restraint even the lowest-cost producer, like the rest, offers to sell at prices regardless of cost. The industry would become very unstable, market prices erratic, unpredictable, undependable, and business and industrial enterprises become mere speculation, and that the economic waste resulting from such failures becomes a heavy burden on national economy.

—o—

(Tr. 45543)

Mr. Withrow: I offer to prove that this witness, if permitted to testify, would testify in his opinion there is no method of marketing which would be better adapted to the ultimate consumer's interest than the basing-point method.

—o—

(Tr. 45550)

Mr. Withrow: I offer to prove that this witness would testify, if permitted, that in order to abolish the so-called dumping in the cement industry it would require legislative action prohibiting the absorption of freight.

—o—

(Tr. 45559)

Mr. Withrow: Your Honor, I offer to prove by this witness, had he been permitted to testify, the ratio of profits to investment in an industry such as the cement industry would be an indication, a strong indication, of the existence of competition in that industry.

—o—

(Tr. 45569)

Mr. Withrow: I offer to prove through this witness that if he were permitted to testify that there is nothing in the nature of cross-hauling which prevents its existence in other industries than the cement industry, and that it is a phenomenon which economists expect to arise in many industries of different types under a state of competition.

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(Tr. 45610-11)

Mr. Withrow: I offer to prove through this witness, if he were permitted to testify, that under the assumptions contained in the question, in his opinion, the total cost to the Government would be raised by virtue of the fact that selling was carried on under that uniform f.o.b. mill system, because on a basing-point system competitors would quote as low a price as the producer in whose natural market area the Government project was located, which would mean that they would meet the lowest quotation, and if they were all quoting uniform f.o.b. mill prices the portion required from a more distant mill would be priced at the uniform mill price, plus freight from the more distant mill, which means higher cost to the Government.

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(Tr. 45900-01)

Mr. Leisure: I offer to prove that the witness would testify, if allowed to do so in response to the question which I have just asked him, that the Government would be buying cement at two prices, the price close to the mill and then the higher price from the more distant mill, and that if the f.o.b. mill prices are the same as the basing-point prices then the total cost to the Government would be increased because of the higher price paid to the mill farther away.

—o—

(Tr. 46262-63)

Mr. Bond: Well, we offer to show through this witness that he is an expert economist qualified to testify as an expert in this case by virtue of his training and teaching experience and his study of the problems in the field of economics, and particularly in the field of marketing, and that if he were permitted to testify he would testify upon the same hypothetical questions which have been sub-

mitted to prior witnesses, and in general accord with their testimony on direct.

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He would also testify that he was in disagreement with the economists called by the Commission upon many of their statements, such as have already been placed before previous witnesses, and on which they have also disagreed.

(Tr. 47470-99)

Mr. Bond: I offer to prove that the firm of Price, Waterhouse & Company has ascertained through an examination of the records of fifty cement companies the amount of net investment in domestic cement operations of the individual companies and the net earnings from such investments for each of the years 1928 to 1937, inclusive.

The list of companies included is as follows:

Aetna Portland Cement Company, Detroit, Mich.
Alpha Portland Cement Company, Easton, Pa.
Beaver Portland Cement Company, Portland, Ore.
Bessemer Limestone & Cement Company, Youngstown, Ohio.
Calaveras Cement Company, San Francisco, Calif.
Castalia Portland Cement Company, Pittsburgh, Pa.
Consolidated Cement Corporation, Chicago, Ill.
Coplay Cement Manufacturing Company, Coplay, Pa.
Cumberland Portland Cement Company, Cowan, Tenn.
Dewey Portland Cement Company, Kansas City, Mo.
Diamond Portland Cement Company, Middle Branch, Ohio.
Edison Cement Corporation, New York, N. Y.
Federal Portland Cement Company, Inc., Buffalo, N. Y.
Florida Portland Cement Company, Chicago, Ill.
Georgia Cement & Products Company, Atlanta, Ga.
Giant Portland Cement Company, Philadelphia, Pa.
Glens Falls Portland Cement Company, Glens Falls, N. Y.
Great Lakes Portland Cement Corporation, Buffalo, N. Y.
Hawkeye Portland Cement Company, Des Moines, Iowa.
Hercules Cement Corporation, Philadelphia, Pa.
Hermitage Portland Cement Company, Nashville, Tenn.

Keystone Portland Cement Company, Philadelphia, Pa.
Kosmos Portland Cement Company, Louisville, Ky.
Lawrence Portland Cement Company, New York, N. Y.
Lehigh Portland Cement Company, Allentown, Pa.
Lone Star Cement Corporation, New York, N. Y.
Medusa Portland Cement Company, Cleveland, Ohio.
Missouri Portland Cement Company, St. Louis, Mo.
Monarch Cement Company, Humboldt, Kansas.
Monolith Portland Cement Company, Los Angeles, Calif.
Monolith Portland Midwest Company, Los Angeles, Calif.
National Cement Company, Birmingham, Ala.
Nazareth Cement Company, Nazareth, Pa.
North American Cement Corporation, Albany, N. Y.
Northwestern States Portland Cement Company, Mason City, Iowa.
Peerless Cement Corporation, Detroit, Mich.
Pennsylvania-Dixie Cement Corporation, New York, N. Y.
Petoskey Portland Cement Company, Petoskey, Mich.
Signal Mountain Portland Cement Company, Chicago, Ill.
Southern States Portland Cement Company, Rockmart, Ga.
Southwestern Portland Cement Company, El Paso, Texas.
Spokane Portland Cement Company, Spokane, Wash.
Standard Portland Cement Company, Cleveland, Ohio.
Superior Cement Corporation, Portsmouth, Ohio.
Trinity Portland Cement Company, Chicago, Ill.
Universal Atlas Cement Company, Chicago, Ill.
Volunteer Portland Cement Company, Knoxville, Tenn.
Vulcanite Portland Cement Company, Philadelphia, Pa.
West Penn Cement Company, Butler, Pa.
Wolverine Portland Cement Company, Coldwater, Mich.

That these 50 companies own and operate 121 mills or approximately 80 percent of the mill capacity of the mills operated by all the Respondents in this proceeding; that

the average rate of return upon investment in domestic cement operations of the said 50 companies listed for the said 10-year period from 1928 to 1937, inclusive, was after deduction of federal income taxes 2.99 percent on the average net investment; that the average rate of return for said period before deduction of federal income taxes was 3.56 percent on the average net investment.

I further offer to prove that said rate of return for the respective years after federal income taxes was as follows:

1928	Profit	10.21	Percent
1929	"	7.23	"
1930	"	6.88	"
1931	Loss	3.14	"
1932	"	5.60	"
1933	"	1.55	"
1934	Profit	2.58	"
1935	"	0.39	"
1936	"	6.90	"
1937	"	4.73	"

and that before deduction of federal income taxes said return was as follows:

1928	Profit	11.43	Percent
1929	"	7.98	"
1930	"	7.68	"
1931	Loss	3.01	"
1932	"	5.59	"
1933	"	1.49	"
1934	Profit	2.95	"
1935	"	0.58	"
1936	"	8.14	"
1937	"	5.67	"

I further offer to prove that the investment in domestic cement manufacturing facilities of said fifty companies for the said ten-year period from 1928 to 1937, inclusive, averaged $182,001,239, and that said investment on December 31, 1937, was $137,213,236.

I further offer to prove that the values of properties and equipment used have been the values recognized in each of said years by the United States Treasury Department for federal income tax purposes so far as the basic values thereof for tax purposes have been established by the Treasury and that the remaining assets were taken at net book values less any depreciation.

I further offer to prove that the net income of each company for each of said years was ascertained from the federal income tax returns of said companies as adjusted by subsequent audits of the Treasury Department.

I further offer to prove that such survey was made conservatively, all doubtful items being resolved upon a basis which would tend to increase the rate of return upon investment.

I further offer to prove as a further result of said examination that it was ascertained that the five so-called chain companies, namely, Universal Atlas, Lone Star, Lehigh, Alpha and Penn Dixie show an average rate of return upon investment for the said ten-year period, after deduction of federal income taxes, of 2.75 percent and an average rate of return, before deducting federal income taxes, of 3.28 percent.

I further offer to prove that the rate of return for said five so-called chain companies for each of said years was after deduction of federal income taxes as follows:

1928	Profit	10.01	Percent
1929	"	6.46	"
1930	"	6.44	"
1931	Loss	2.28	"
1932	"	5.52	"
1933	"	1.82	"
1934	Profit	1.82	"
1935	Loss	0.54	"
1936	Profit	6.34	"
1937	"	4.13	"

and that before deduction of federal income taxes the return was as follows:

1928	Profit	11.16	Percent
1929	"	7.09	"
1930	"	7.21	"
1931	Loss	2.08	"
1932	"	5.52	"
1933	"	1.80	"
1934	Profit	2.09	"
1935	Loss	0.46	"
1936	Profit	7.60	"
1937	"	4.92	"

I further offer to prove that for the remaining 45 companies other than said five so-called chain companies the

rate of return upon investment, after deducting federal income taxes, was 3.24 percent and the average rate of return of said companies before deducting federal income taxes was 3.86 percent.

I further offer to prove that the rate of return on the said 45 companies other than the said five so-called chain companies was after the deduction of federal income taxes as follows:

1928	Profit	10.47	Percent
1929	"	8.17	"
1930	"	7.34	"
1931	Loss	4.03	"
1932	"	5.68	"
1933	"	1.29	"
1934	Profit	3.34	"
1935	"	1.28	"
1936	"	7.41	"
1937	"	5.27	"

and before deduction of federal income taxes the rate of return was as follows:

1928	Profit	11.75	Percent
1929	"	9.06	"
1930	"	8.16	"
1931	Loss	3.98	"
1932	"	5.67	"
1933	"	1.17	"
1934	Profit	3.82	"
1935	"	1.58	"
1936	"	8.63	"
1937	"	6.35	"

I further offer to prove that said survey shows that after deduction of federal income taxes 12 companies showed a net loss for said ten-year period, two of said companies having losses of 4.42 percent and 8.97 percent respectively; that two other companies earned less than 1 percent for said period; that eight other companies had profits of between 1 and 2 percent for said period; that seven other companies had profits between 2 and 3 percent for said period; that six other companies had profits of between 3 and 4 percent for said period; that six other companies had profits of between 4 and 7 percent for said period; that six other companies had profits of between 7 and 10 percent for said period and that three companies

earned in excess of 10 percent for said period, the highest being 12.46 percent.

I further offer to prove that after deduction of federal income taxes said survey shows the earnings of one company for said period to have been as follows:

1928	Loss	1.23	Percent
1929	"	.32	"
1930	Profit	10.43	"
1931	Loss	3.49	"
1932	"	2.44	"
1933	Profit	2.90	"
1934	"	7.00	"
1935	"	5.72	"
1936	"	8.99	"
1937	"	10.42	"

or an average profit for said period of 3.70 percent.

That another company for said period showed the following:

1928	Profit	8.50	Percent
1929	"	5.36	"
1930	"	4.12	"
1931	Loss	.07	"
1932	"	4.34	"
1933	"	1.27	"
1934	Profit	2.31	"
1935	Loss	4.34	"
1936	Profit	5.94	"
1937	"	2.45	"

or an average profit for said period of 2.04 percent.

That another company for said period showed the following:

1928	Loss	2.08	Percent
1929	"	.12	"
1930	Profit	4.25	"
1931	"	2.69	"
1932	"	.78	"
1933	"	2.46	"
1934	"	6.61	"
1935	"	.45	"
1936	"	3.67	"
1937	"	3.26	"

or an average profit of 2.15 percent.

That another company for said period showed the following:

1928	Profit	6.27	Percent
1929	"	2.61	"
1930	"	5.12	"
1931	"	2.98	"
1932	Loss	2.43	"
1933	Profit	.26	"
1934	"	2.82	"
1935	"	1.68	"
1936	"	3.32	"
1937	"	4.56	"

or an average profit of 2.67 percent.

That another company for said period showed the following:

1928	Profit	4.93	Percent
1929	"	5.36	"
1930	"	5.33	"
1931	Loss	8.28	"
1932	"	11.45	"
1933	"	2.49	"
1934	Profit	.39	"
1935	"	.69	"
1936	"	5.33	"
1937	"	5.99	"

or an average profit of .42 percent.

That another company for said period showed the following:

1928	Profit	5.93	Percent
1929	"	7.91	"
1930	"	8.56	"
1931	"	2.64	"
1932	Loss	12.77	"
1933	"	7.55	"
1934	"	5.98	"
1935	"	1.20	"
1936	"	6.77	"
1937	Profit	1.07	"

or an average loss of .40 percent.

That another company for said period showed the following:

1928	Profit	8.71	Percent
1929	"	4.41	"
1930	"	2.33	"
1931	Loss	10.98	"
1932	"	5.05	"
1933	Profit	.67	"
1934	"	3.87	"
1935	"	2.85	"
1936	"	4.97	"
1937	Loss	1.55	"

or an average profit of 1.22 percent.

That another company for said period showed the following:

1928	Profit	12.59	Percent
1929	"	8.80	"
1930	Loss	5.03	"
1931	"	36.71	"
1932	"	28.13	"
1933	"	13.06	"
1934	Profit	15.34	"
1935	Loss	4.52	"
1936	Profit	5.07	"
1937	"	7.04	"

or an average loss of 1.95 percent.

That another company for said period showed the following:

1928	Profit	6.87	Percent
1929	Loss	5.65	"
1930	"	3.06	"
1931	"	9.36	"
1932	"	20.99	"
1933	"	9.20	"
1934	Profit	1.47	"
1935	Loss	1.58	"
1936	Profit	.82	"
1937	Loss	5.82	"

or an average loss of 4.42 percent.

That another company for said period showed the following:

1928	Profit	1.97	Percent
1929	Loss	4.35	"
1930	"	2.32	"
1931	"	7.85	"
1932	"	9.19	"
1933	"	3.55	"
1934	Profit	1.79	"
1935	"	.71	"
1936	"	1.35	"
1937	Loss	1.97	"

or an average loss of 2.50 percent.

That another company for said period showed the following:

1928	Profit	4.32	Percent
1929	"	4.61	"
1930	"	3.54	"
1931	Loss	13.83	"
1932	"	11.60	"
1933	"	8.21	"
1934	"	1.31	"
1935	"	2.63	"
1936	Profit	4.14	"
1937	"	1.77	"

or an average loss of 1.36 percent.

That another company for said period showed the following:

1928	Loss	12.05	Percent
1929	"	12.13	"
1930	"	4.37	"
1931	"	2.75	"
1932	"	8.47	"
1933	"	.47	"
1934	Profit	2.05	"
1935	"	5.57	"
1936	"	7.96	"
1937	"	5.93	"

or an average loss of 1.57 percent.

That another company for said period showed the following:

1928	Profit	8.27	Percent
1929	"	4.38	"
1930	"	7.70	"
1931	Loss	18.97	"
1932	"	10.63	"
1933	"	6.78	"
1934	"	1.63	"
1935	Profit	2.18	"
1936	"	4.40	"
1937	"	2.12	"

or an average loss of .82 percent.

That another company for said period showed the following:

1928	Profit	7.31	Percent
1929	"	3.55	"
1930	"	4.56	"
1931	Loss	7.71	"
1932	"	11.10	"
1933	"	6.61	"
1934	"	7.15	"
1935	Profit	.35	"
1936	"	1.51	"
1937	"	2.53	"

or an average loss of .92 percent.

That another company for said period showed the following:

1928	Profit	4.33	Percent
1929	"	6.79	"
1930	"	2.62	"
1931	Loss	13.80	"
1932	"	10.32	"
1933	"	2.35	"
1934	Profit	.39	"
1935	Loss	.20	"
1936	Profit	1.26	"
1937	"	1.05	"

or an average loss of .84 percent.

That another company for said period showed the following:

1928	Profit	2.98	Percent
1929	"	5.75	"
1930	"	4.09	"
1931	Loss	.72	"
1932	"	4.31	"
1933	"	4.35	"
1934	Profit	.93	"
1935	Loss	2.70	"
1936	Profit	.46	"
1937	Loss	3.00	"

or an average profit of .19 percent.

That another company for said period showed the following:

1928	Profit	4.48	Percent
1929	"	3.76	"
1930	"	2.97	"
1931	"	1.64	"
1932	Loss	2.13	"
1933	"	.45	"
1934	"	.67	"
1935	Profit	3.26	"
1936	"	3.63	"
1937	"	1.58	"

or an average profit of 1.92 percent.

That another company for said period showed the following:

1928	Profit	10.08	Percent
1929	"	6.70	"
1930	"	4.70	"
1931	Loss	3.47	"
1932	"	6.73	"
1933	"	2.81	"
1934	"	.67	"
1935	"	.54	"
1936	Profit	6.17	"
1937	"	1.38	"

or an average profit of 1.63 percent.

That another company for said period showed the following:

1928	Profit	8.00	Percent
1929	"	6.91	"
1930	"	8.78	"
1931	Loss	.56	"
1932	"	1.21	"
1933	"	.30	"
1934	Profit	1.70	"
1935	Loss	3.37	"
1936	Profit	.68	"
1937	Loss	4.67	"

or an average profit of ~~1.92~~ percent.

That another company for said period showed the following:

1928	Profit	.16	Percent
1929	Loss	2.07	"
1930	"	1.48	"
1931	"	1.04	"
1932	"	5.22	"
1933	"	1.04	"
1934	Profit	8.70	"
1935	"	5.82	"
1936	"	9.86	"
1937	"	9.50	"

or an average profit of 1.77 percent.

That another company for said period showed the following:

1928	Profit	8.40	Percent
1929	"	6.22	"
1930	"	7.71	"
1931	Loss	4.51	"
1932	"	5.58	"
1933	"	.55	"
1934	Profit	1.13	"
1935	Loss	.93	"
1936	Profit	4.37	"
1937	"	2.00	"

or an average profit of 2.00 percent.

That another company for said period showed the following:

1928	Profit	6.43	Percent
1929	"	4.62	"
1930	"	7.44	"
1931	Loss	3.90	"
1932	"	8.78	"
1933	"	2.59	"
1934	Profit	1.26	"
1935	"	.59	"
1936	"	8.17	"
1937	"	6.17	"

or an average profit of 1.84 percent.

That another company for said period showed the following:

1928	Profit	12.00	Percent
1929	"	5.45	"
1930	"	6.90	"
1931	Loss	1.54	"
1932	"	6.43	"
1933	"	5.57	"
1934	Profit	2.71	"
1935	"	2.18	"
1936	"	7.57	"
1937	"	3.73	"

or an average profit of 2.98 percent.

That another company for said period showed the following:

1928	Profit	8.77	Percent
1929	"	13.86	"
1930	"	13.01	"
1931	Loss	2.34	"
1932	"	6.31	"
1933	"	.41	"
1934	Profit	1.84	"
1935	Loss	4.91	"
1936	Profit	2.78	"
1937	Loss	.31	"

or an average profit of 2.81 percent.

That another company for said period showed the following:

1928	Profit	19.53	Percent
1929	"	16.78	"
1930	"	7.16	"
1931	Loss	6.37	"
1932	"	6.82	"
1933	"	3.64	"
1934	Profit	3.22	"
1935	"	.15	"
1936	"	7.77	"
1937	"	4.11	"

or an average profit of 3.29 percent.

That another company for said period showed the following:

1928	Profit	7.44	Percent
1929	"	8.16	"
1930	"	5.49	"
1931	Loss	4.25	"
1932	"	5.69	"
1933	Profit	.56	"
1934	"	5.76	"
1935	"	2.75	"
1936	"	9.80	"
1937	"	4.42	"

or an average profit of 3.48 percent.

That another company for said period showed the following:

1928	Profit	16.48	Percent
1929	"	14.47	"
1930	"	8.46	"
1931	Loss	15.14	"
1932	"	12.91	"
1933	"	2.78	"
1934	Profit	1.84	"
1935	"	2.86	"
1936	"	9.27	"
1937	"	4.32	"

or an average profit of 3.14 percent.

That another company for said period showed the following:

1928	Profit	11.52	Percent
1929	"	7.63	"
1930	"	10.79	"
1931	Loss	6.43	"
1932	"	12.90	"
1933	"	1.61	"
1934	Profit	6.04	"
1935	"	.99	"
1936	"	13.98	"
1937	"	8.35	"

or an average profit of 3.93 percent.

That another company for said period showed the following:

1928	Profit	12.06	Percent
1929	"	9.29	"
1930	"	10.76	"
1931	Loss	8.32	"
1932	"	8.18	"
1933	"	2.08	"
1934	Profit	1.60	"
1935	"	.92	"
1936	"	9.23	"
1937	"	7.76	"

or an average profit of 4.08 percent.

That another company for said period showed the following:

1928	Profit	15.36	Percent
1929	"	11.79	"
1930	"	6.05	"
1931	Loss	3.35	"
1932	Profit	2.14	"
1933	Loss	.40	"
1934	Profit	4.65	"
1935	Loss	3.52	"
1936	Profit	6.17	"
1937	"	6.09	"

or an average profit of 4.94 percent.

That another company for said period showed the following:

1928	Profit	12.54	Percent
1929	"	10.99	"
1930	"	12.95	"
1931	"	4.33	"
1932	Loss	3.18	"
1933	"	1.86	"
1934	"	1.31	"
1935	"	1.42	"
1936	Profit	4.65	"
1937	"	11.09	"

or an average profit of 5.09 percent.

That another company for said period showed the following:

1928	Profit	3.52	Percent
1929	"	8.21	"
1930	"	3.24	"
1931	Loss	7.75	"
1932	"	6.23	"
1933	"	1.51	"
1934	Profit	9.19	"
1935	"	13.26	"
1936	"	16.74	"
1937	"	18.81	"

or an average profit of 5.45 percent.

That another company for said period showed the following:

1928	Profit	27.70	Percent
1929	"	19.28	"
1930	"	3.11	"
1931	"	1.06	"
1932	Loss	2.41	"
1933	"	1.49	"
1934	Profit	.45	"
1935	"	3.34	"
1936	"	11.85	"
1937	"	5.77	"

or an average profit of 7.07 percent.

That another company for said period showed the following:

1928	Profit	.35	Percent
1929	"	7.65	"
1930	"	9.84	"
1931	"	7.26	"
1932	Loss	.02	"
1933	Profit	1.88	"
1934	"	12.91	"
1935	"	17.89	"
1936	"	12.47	"
1937	"	11.57	"

or an average profit of 8.20 percent.

That another company for said period showed the following:

1928	Profit	23.66	Percent
1929	"	16.37	"
1930	"	15.51	"
1931	Loss	10.82	"
1932	"	4.91	"
1933	"	6.97	"
1934	Profit	4.19	"
1935	"	3.67	"
1936	"	18.89	"
1937	"	11.61	"

or an average profit of 8.10 percent.

That another company for said period showed the following:

1928	Profit	20.76	Percent
1929	"	11.32	"
1930	"	14.70	"
1931	Loss	1.55	"
1932	Profit	2.19	"
1933	"	3.64	"
1934	"	9.16	"
1935	"	7.66	"
1936	"	14.56	"
1937	"	14.90	"

or an average profit of 9.49 percent.

That another company for said period showed the following:

1928	Profit	21.70	Percent
1929	"	27.09	"
1930	"	19.00	"
1931	Loss	.50	"
1932	"	2.02	"
1933	Profit	2.07	"
1934	Loss	1.65	"
1935	Profit	6.81	"
1936	"	14.49	"
1937	"	15.61	"

or an average profit of 10.02 percent.

That another company for said period showed the following:

1928	Profit	27.65	Percent
1929	"	25.98	"
1930	"	22.54	"
1931	"	1.11	"
1932	Loss	.51	"
1933	Profit	5.59	"
1934	"	12.66	"
1935	"	9.23	"
1936	"	15.46	"
1937	"	10.04	"

or an average profit of 12.45 percent.

That another company for said period showed the following:

1928	Profit	25.32	Percent
1929	"	14.81	"
1930	"	4.84	"
1931	"	2.43	"
1932	Loss	4.75	"
1933	Profit	17.82	"
1934	"	14.65	"
1935	"	8.14	"
1936	"	21.44	"
1937	"	18.38	"

or an average profit of 12.46 percent.

I further offer to prove that the source and the only source which Price, Waterhouse & Company used in making said survey was the original books and records and annual tax returns of the respective companies.

I offer to make all of said books and records available to Counsel for the Commission in the event that said evidence is received.

I further offer to call for cross-examination any of the employees of Price, Waterhouse & Company who did the detailed work in the offices of the various companies under the supervision of Mr. Lothrop and upon which work the survey was based.

I further offer to prove that for said ten-year period, from 1928 to 1937, inclusive, the average Treasury interest rate upon all United States Government interest-bearing obligations was 3.31 percent for said period.

(Tr. 47519-23)

Mr. Bond: I offer to prove through this witness that an examination of the plants and equipment of the fifty cement companies hereinafter reported, shows that as of January 1, 1938, the total reproduction cost of new cement manufacturing facilities used in domestic cement operations was $441,236,650 for the 121 plants of these fifty companies. These fifty companies are as follows:

Aetna Portland Cement Company, Detroit, Mich.
Alpha Portland Cement Company, Easton, Pa.
Beaver Portland Cement Company, Portland, Ore.
Bessemer Limestone & Cement Company, Youngstown, Ohio.
Calaveras Cement Company, San Francisco, Calif.
Castalia Portland Cement Company, Pittsburgh, Pa.
Consolidated Cement Corporation, Chicago, Ill.
Coplay Cement Manufacturing Company, Coplay, Pa.
Cumberland Portland Cement Company, Cowan, Tenn.
Dewey Portland Cement Company, Kansas City, Mo.
Diamond Portland Cement Company, Middle Branch, Ohio.
Edison Cement Corporation, New York, N. Y.
Federal Portland Cement Company, Inc., Buffalo, N. Y.
Florida Portland Cement Company, Chicago, Ill.
Georgia Cement & Products Company, Atlanta, Ga.
Giant Portland Cement Company, Philadelphia, Pa.

Glens Falls Portland Cement Company, Glens Falls, N. Y.
Great Lakes Portland Cement Corporation, Buffalo, N. Y.
Hawkeye Portland Cement Company, Des Moines, Iowa.
Hercules Cement Corporation, Philadelphia, Pa.
Hermitage Portland Cement Company, Nashville, Tenn.
Keystone Portland Cement Company, Philadelphia, Pa.
Kosmos Portland Cement Company, Louisville, Ky.
Lawrence Portland Cement Company, New York, N. Y.
Lehigh Portland Cement Company, Allentown, Pa.
Lone Star Cement Corporation, New York, N. Y.
Medusa Portland Cement Company, Cleveland, Ohio.
Missouri Portland Cement Company, St. Louis Mo.
Monarch Cement Company, Humboldt, Kansas.
Monolith Portland Cement Company, Los Angeles, Calif.
Monolith Portland Midwest Company, Los Angeles, Calif.
National Cement Company, Birmingham, Ala.
Nazareth Cement Company, Nazareth, Pa.
North American Cement Corporation, Albany, N. Y.
Northwestern States Portland Cement Company, Mason City, Iowa.
Peerless Cement Corporation, Detroit, Mich.
Pennsylvania-Dixie Cement Corporation, New York, N. Y.
Petoskey Portland Cement Company, Petoskey, Mich.
Signal Mountain Portland Cement Company, Chicago, Ill.
Southern States Portland Cement Company, Rockmart, Ga.
Southwestern Portland Cement Company, El Paso, Texas.
Spokane Portland Cement Company, Spokane, Wash.
Standard Portland Cement Company, Cleveland, Ohio.
Superior Cement Corporation, Portsmouth, Ohio.
Trinity Portland Cement Company, Chicago, Ill.
Universal Atlas Cement Company, Chicago, Ill.
Volunteer Portland Cement Company, Knoxville, Tenn.

Vulcanite Portland Cement Company, Philadelphia, Pa.
West Penn Cement Company, Butler, Pa.
Wolverine Portland Cement Company, Coldwater, Mich.

That these are the same fifty companies as were covered by the Price-Waterhouse survey.

I further offer to prove that the total production costs new of such cement manufacturing facilities are larger than the net investment in such facilities found by Price-Waterhouse in its survey, and that such reproduction cost new is larger than the net investment in the facilities of the respective companies as found by Price-Waterhouse.

I further offer to prove that this survey does not include any allowance for mineral reserve, lands, transportation facilities used in the shipment of cement from plant, housing facilities, or for other properties not directly connected with the manufacture of cement.

I further offer to prove that this survey was made covering the same manufacturing facilities as was determined by Price-Waterhouse to be $137,213,236 as of December 31, 1937.

I further offer to prove that this survey was made on the basis of a physical inspection of the manufacturing facilities covered, and I offer to make all of these details of said valuation by companies, plants, and each of them, of plant facilities, available to counsel for the Commission available in the event this evidence were received, and that the plant facilities will be open to engineers of the Commission for their examination.

I further offer to call any of the employees of Ford, Bacon & Davis for cross-examination if the evidence is received.

(Tr. 47684)

Trial Examiner Norwood: You now offer to prove what is contained in Respondents' Exhibit 3659-A to Z-74, for identification?

Mr. Brick: Yes, sir; and we are willing to do it that way, as far as the mechanics are concerned, if Mr. Wooden and your Honor have no objection to it, but we want it to stand as an offer of proof of the same character which we would have made if the witnesses were on the stand and

at that time we offered to establish through those witnesses the proof relating to the matters contained in these papers.

(Tr. 47687)

Mr. Brick: I offer to prove the facts and matters contained in Respondents' Exhibit, for identification, No. 3659-A to Z-74, that being the material which we would be prepared to establish if given an opportunity to do so.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

(Caption 8371)

Notice and Motion of Marquette Cement Manufacturing Company for Leave to Adduce Additional Evidence.

To William T. Kelly, Esq., Walter B. Wooden, Esq., Counsel for Respondent, Federal Trade Commission Building, Washington, D. C.

Please take notice that on the 20th day of March, 1944, we are filing with the Honorable Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, this Motion on behalf of Marquette Cement Manufacturing Company, Petitioner, for an order:

1. Granting leave to Petitioner to adduce additional material evidence, said additional evidence being as follows:

a. The following portion of the stipulated testimony of D. S. Colburn, Vice President of Petitioner, together with Respondent's Exhibit 2990, a photostat of which is attached hereto and made a part hereof, the said portion of stipulated testimony being as follows:

"That on December 27, 1939, Marquette's field representatives and salesmen reported to its main office in Chicago that they had run across announcements in the field made by competitors that such competitors would immediately begin to sell cement delivered to its customers' destinations, prepaying freight on all shipments thereof; that this was verified by inquiries and reports made at various points in its marketing area; that Marquette's chief offi-

cers and executives discussed the effect of such announcements by competitors of Marquette, and concluded that such prepayment of freight would relieve dealers from the necessity of tying up working capital and would be very attractive to them and would result in loss of business to Marquette and would put its dealers at a very serious disadvantage in competition with dealers marketing other brands of cement in competition with Marquette cement, and, therefore, in accordance with its usual custom of protecting its dealers, Marquette did, on December 30, 1939, send out to all dealers in its trade area a postal card announcing that since it had come to its attention that dealers and other cement buyers in its territory had been notified that competitors from and after December 27, 1939, would prepay freight on all shipments of cement, Marquette assured its customers that it would do likewise; that one of such postal cards is hereto attached, marked for identication Respondent Marquette's Exhibit 3. (Received in evidence as Resp. Ex. 2990.)"

b. Marquette's Exhibits Nos. 1 through 23 inclusive, which constituted a part of the "Petition, Motion and Supporting Affidavit, of the Respondent Marquette Cement Manufacturing Company, a corporation, to recuse the Federal Trade Commission, as now constituted, from passing upon the issues in the above entitled cause", filed with the Secretary of the Federal Trade Commission in the proceedings below. Said Petition and Motion proffered these exhibits in evidence. These exhibits constituting a part of said Petition and Motion, are contained in the transcript of proceedings certified to this Honorable Court by the Secretary of the Federal Trade Commission.

c. "Report of the Federal Trade Commission on Distribution Methods and Costs, Part III—Building Materials. Lumber, Paints and Varnishes, and Portland Cement.", submitted to the Congress of the United States of America by the Federal Trade Commission on February 19, 1944.

2. Directing that such additional evidence, including exhibits, be admitted in evidence and considered as part of the record before this court for consideration by this court under the Petition to Review and Set Aside Orders of the Federal Trade Commission filed in this court by Petitioner, or, in the alternative, that such additional evidence be taken before the Commission and adduced upon the hearing before the Commission in such manner and upon such

terms and conditions as to the court may seem proper and directing the Commission to make such additional findings as such additional evidence may warrant and to certify and return such additional evidence and findings to this court when taken.

3. Granting Petitioner such other and further relief as to the court may seem just and proper.

In support of this motion, there is attached the Affidavit of Edward A. Zimmerman, dated March 20, 1944.

Zimmerman & Norman
By William R. Engelhardt
Edward A. Zimmerman
Members of Firm
Attorneys for Petitioner
111 W. Monroe Street
Chicago, Illinois
Central 0803

RESPONDENT MARQUETTE'S EXHIBIT 3.

December 30, 1939

Marquette Prepays Freight on Cement

It has come to our attention that dealers and other cement buyers in this territory have been notified by one or more of our competitors that from and after December 27, 1939 they will prepay freight on all shipments of cement made by them. We assure our customers that we will do likewise.

Marquette Cement Manufacturing Company.

State of Illinois } ss.
County of Cook }

AFFIDAVIT.

William B. Engelhardt, being first duly sworn on oath deposes and states:

1. He is an attorney and counsellor at law duly admitted to practice in the courts of the State of Illinois, Federal courts situated therein, including the Circuit Court of Appeals for the 7th Circuit; and the Supreme Court of the United States, and is a member of the firm

of Zimmerman and Norman, attorneys for Marquette Cement Manufacturing Company, which filed its Petition to Review and Set Aside Orders of the Federal Trade Commission in this court, directed to proceedings before the Commission entitled, In the Matter of the Cement Institute, an incorporated association, et al., Document No. 3167.

2. Affiant and his firm have been the exclusive attorneys for Petitioner at all times since the inception of proceedings before the Federal Trade Commission; affiant and Edward A. Zimmerman of said firm have been in charge of the defense of Petitioner and on behalf of Petitioner appeared in the proceedings before the Commission; affiant has full knowledge of and with respect to the additional evidence covered by the foregoing Motion for leave to adduce additional evidence.

3. This Motion is made in order that Petitioner may preserve its rights to urge before this court, and otherwise, error in the exclusion of evidence by the Federal Trade Commission, and in order that Petitioner may adduce additional evidence not available at the time proceedings were had before the Federal Trade Commission.

Paragraph 1a of Motion for Leave to Adduce Additional Evidence.

4. The quotation appearing in Paragraph 1a of the motion, in support of which this affidavit is presented, comprised Paragraph 14 of the stipulation entered into by the counsel for Petitioner and counsel for the Respondent, Federal Trade Commission. Said stipulation appears at Pages 39032 to 39053 of the transcript of testimony on file in this Honorable Court, Paragraph 14 appearing at Pages 39039 and 39040. Pursuant to said stipulation the statement quoted in Paragraph 1a of the foregoing motion was incorporated into the record with the same force, weight and effect as if D. S. Colburn, Vice President of Petitioner, had personally appeared and so testified.—(Tr. 39032.) Upon objection by counsel for the Commission that this evidence related to a matter subsequent to the date of the complaint, this portion of the stipulation, together with Respondent's Exhibit 2990, was stricken by the Trial Examiner. (Tr. 39060) This paragraph stood

as an offer of proof by Petitioner, counsel for the Commission agreeing that the witness, D. S. Colburn, who was then on the stand, would testify if permitted by the Examiner to the contents of the substance of Paragraph 14, (Tr. 39940.) The exclusion of this evidence by the Trial Examiner was brought to the attention of the Commission by Marquette's Motion to Reverse Certain Rulings by the Trial Examiner which was denied by the Commission on July 17, 1943.

Earlier Evidence Admitted on the Subject Matter.

5. During the presentation of the evidence on behalf of the Commission, counsel for the Commission elicited testimony from the Commission's witness, Neyland, to the effect that if any one company shipped into a territory on the basis of prepayment of freight, that that would cause all other competitors to do the same thing. (Tr. 6111-6112) During the cross-examination of a witness presented on behalf of other cement companies, counsel for the Commission developed testimony to the effect that all shipments of cement had been prepaid by this company since January 2, 1940; that this company changed from the practice of letting their customers pay the freight bills to the practice of prepayment of freight by the cement company in order to meet competition; that all of this cement company's competitors were prepaying freight so far as this witness knew. (Tr. 29862-29863) This same subject matter was covered during the direct examination of another witness presented on behalf of other cement companies without objection by counsel for the Commission, and counsel for the Commission during cross-examination further developed the change from the practice of this company allowing its customers to pay the freight bills to the practice of this cement company prepaying the freight on all shipments, the testimony thus elicited showing that this cement company learned that its competitors were prepaying freight by reason of a telephone call from a customer asking if this particular company was also going to prepay the freight. (Tr. 31908-9, 31991-5.) Later, during the presentation of testimony on behalf of still another cement company, this same subject matter was covered, the Trial Examiner overruling objection to this

testimony by counsel for the Commission. (Tr. 36169-36173.)

Findings as to the Facts.

6. Despite the rejection of the evidence offered on behalf of Petitioner, Marquette Cement Manufacturing Company, the Findings as to the Facts by the Commission covered the subject matter of the rejected evidence. For example, Paragraph 12 (e) of the Findings as to the Facts states:

> "Some two years after the issuance of the complaint in this proceeding the corporate respondents generally began prepaying the freight charges on all shipments of cement. When freight is prepaid, there can be no diversion of shipments by the consignee to his advantage in price."

Reference to this same subject matter, the prepayment of freight by cement companies, also appears in Paragraph 12 (a) and Paragraph 24 (c) of the Findings as to the Facts.

7. The rejected evidence offered on behalf of Marquette is not only material and relevant to the subject matter thus covered in the Findings as to the Facts, but is also material and relevant and of great importance in that it presents a striking example of the operation of the forces of competition constantly present in the cement industry, and which move cement producers to meet any advantage to customers offered by a competing producer. The testimony graphically illustrates that any cement company, in order to continue in business and to continue to sell its product, must meet any competitive advantage offered to its customers by competitive manufacturers of cement.

Paragraph 1b of the Motion.

8. Marquette's Exhibits No. 1 through 23 were the factual basis and foundation for the motion to recuse the Federal Trade Commission filed by Petitioner with the Commission. As such, these exhibits were not only made a part of the motion, but the motion also proffered these exhibits in evidence before the Commission. The denial of the motion by the Commission carried with it a denial of the offer of these exhibits in evidence. These exhibits

contain the official utterances and statements of the Commission and of members of the Commission. They are included in the foregoing motion to adduce additional evidence to insure that this court will have these exhibits before it at the time that it passes upon Petitioner's motion to recuse the Commission.

Paragraph 1c of the Motion.

9. The report of the Federal Trade Commission listed in this subparagraph of the motion for leave to adduce additional evidence was not published until after this court acquired exclusive jurisdiction over this proceeding. The transcript of record was filed by the Commission with the Clerk of this Honorable Court on September 1, 1943. This report of the Commission was submitted to Congress on February 19, 1944. This Report is another official publication of the Federal Trade Commission and constitutes further evidence of the bias, prejudice and predetermination of the Federal Trade Commission upon which Petitioner's motion to recuse was based.

William R. Engelhardt.

Subscribed and sworn to before me this 20th day of March, 1944.

Elizabeth-Anne Richards,
Notary Public.

(Notarial Seal)

(Endorsed: Filed March 20, 1944. Kenneth J. Carrick, Clerk.)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Superior Portland Cement, Inc., *Petitioner,* *vs.* Federal Trade Commission, *Respondent.*	No. 8386

MOTION BY PETITIONER TO ADDUCE ADDITIONAL EVIDENCE.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Comes now your petitioner, Superior Portland Cement, Inc., of Seattle, Washington, and pursuant to the provisions of Section 5(c) of the Federal Trade Commission Act, U.S.C. Title 15, Section 45, and pursuant to Section 11 of the Clayton Anti-Trust Act, U. S. C. Title 15, Section 21, does hereby move the court for an order granting leave to petitioner to adduce before this court for consideration on this appeal the following evidence in addition to that admitted by the Federal Trade Commission on the hearing of the case below:

I.

As is permitted by the order of this court in this cause made and entered on January 25, 1944, petitioner does hereby by reference ask leave to adduce as fully as though set forth at length herein, each and every item set forth in any motion for leave to adduce additional evidence filed by any and every petitioner in the following cases in this court brought to review the same order of the Federal Trade Commission as is involved herein:

Aetna Portland Cement Company, a corporation, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8360;

The Cement Institute, an unincorporated association, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8361;

Blaine S. Smith, et al, petitioners, *vs.* Federal Trade Commission, respondent, No. 8410;

Riverside Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8393;

Marquette Cement Manufacturing Company, a corporation, petitioners, *vs.* Federal Trade Commission, respondent, No. 8371;

Calaveras Cement Company, a corporation, petitioner, *vs.* Federal Trade Commision, respondent, No. 8372;

Northwestern Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8389;

Huron Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8373;

California Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8402; and

Universal Atlas Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8399.

In addition to the matters so adopted by reference, petitioner asks to leave to adduce the following items:

II.

Exhibits marked $\frac{2\text{-}98}{3167\text{-}D}$ through $\frac{2\text{-}120}{3167\text{-}1}$ offered in evidence before the Commission and rejected by the Commission. These exhibits were offered to show the bias and prejudice of the Commission against the respondents before the Commission and to show the prejudgment of the issues by the Commission. They are material to the points being raised by petitioner in this court to the effect that the due process clause of the Fifth Amendment to the Constitution of the United States has been violated and that there are no valid Findings of Fact to support the Order to Cease and Desist entered by the Commission.

The documents to be adduced are more particularly described as follows:

1. Annual Reports of the Federal Trade Commission for all Fiscal years beginning after June 30, 1926 to and including the Fiscal year ended June 30, 1941, copies of which are presented herewith and made a part hereof as Marquette's Exhibits Nos. 1 through 15.

2. Report of the Federal Trade Commission on Price Bases Inquiry. The Basing Point Formula and Cement Prices. March, 1932. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 16.

3. Cement Industry: Senate Document No. 71, 73rd Congress, 1st Session. Report by the Federal Trade Commission to the Senate. June, 1933. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 17.

4. Practices of the Steel Industry Under the Code, Senate Doc. No. 159, being a letter from the Chairman of the Federal Trade Commission transmitting in response to Senate Resolution No. 166 a report on the steel industry and the "Code of Fair Competition," relating to that industry dated March 20, 1934, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 18.

5. Report of the Federal Trade Commission to the President with respect to the Basing-Point System in the Iron and Steel Industry. November, 1934. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 19.

6. Statements of Honorable R. E. Freer and Hugh E. White, on behalf of the Federal Trade Commission, at Hearings before the Committee on Interstate Commerce, U. S. Senate 74th Congress, second session on S. 4055 March 9 to April 10, 1936 appearing at pages 309-325 and 389-395 of a transcript of said hearings, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 20.

7. Federal Trade Commission Report to the President on Steel Sheet Piling, dated June 10, 1936, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 21.

8. Press Release of Federal Trade Commission, dated July 5, 1937, on the issuance of the Complaint in the instant proceeding, copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 22.

9. Investigation of Concentration of Economic Power, Monograph No. 42. "The Basing Point Problem," printed for the use of the Temporary National Economic Committee. 1941. Copy of which is presented herewith and made a part hereof as Marquette's Exhibit No. 23.

III.

Testimony set out in offer by Mr. Little, attorney for petitioner, to the Trial Examiner on June 13, 1939, and reported in Tr. 21599, line 19, to Tr. 21602, line 14, inclusive, to prove by witness Percy I. Taylor that petitioner made f.o.b. mill bids to the Bureau of Reclamation on June 13, 1938, and April 26, 1939. This offer was rejected by the Trial Examiner, as reported in Tr. 21605.

IV.

Testimony set out in offer by Mr. Little, attorney for petitioner, to the Trial Examiner on June 15, 1939, and reported in Tr. 21803, line 13 to Tr. 21816, line 15, inclusive, to prove by witness Admiral Peoples that petitioner made f.o.b. mill bids to the Procurement Division of the Treasury Department on proposals dated December 7, 1938, February 27, 1939, and April 19, 1939. This offer was rejected by the Trial Examiner as reported in Tr. 21818 and 21819.

V.

Testimony set out in offer by Mr. Shefelman, attorney for Northwestern Portland Cement Co. to the Trial Examiner on June 16, 1939, and reported in Tr. 21913, line 23, to Tr. 21920, line 19, inclusive, to prove by witness Walter B. Fry that the Interior Department, during the entire period covered Mr. Fry's testimony on behalf of the Commission, had received numerous f.o.b. mill bids from the cement companies in Western Washington. This offer was adopted by petitioner as shown in Tr. 21920. This offer was rejected by the Trial Examiner as reported in Tr. 21922.

Dated March 15th, 1944.

Respectfully submitted,

F. A. LeSourd,
Of Little, Leader, LeSourd & Palmer,
1510 Hoge Building,
Seattle, Washington,
Attorneys for Petitioner.

IN THE UNITED CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Northwestern Portland Cement Company, *Petitioner,*
vs.
Federal Trade Commission, *Respondent.*
No. 8389.

MOTION BY PETITIONER TO ADDUCE ADDITIONAL EVIDENCE.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Comes now your petitioner, Northwestern Portland Cement Company, of Seattle, Washington, and, pursuant to the provisions of Section 5(c) of the Federal Trade Commission Act, U. S. C. Title 15, Section 45, and pursuant to Section 11 of the Clayton Act, U. S. C. Title 15, Section 21, does hereby move the court for an order granting leave to petitioner to adduce before this court for consideration on this appeal the following evidence in addition to that admitted by the Federal Trade Commission on the hearing of the case below:

I.

As is permitted by the order of this court in this cause made and entered on January 25, 1944, petitioner does hereby by reference ask leave to adduce as fully as though set forth at length herein, each and every item set forth in any motion for leave to adduce additional evidence filed by any and every petitioner in the following cases in this court brought to review the same order of the Federal Trade Commission as is involved herein:

Aetna Portland Cement Company, a corporation, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8360;

The Cement Institute, an unincorporated association, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8361;

Blaine S. Smith, et al., petitioners, *vs.* Federal Trade Commission, respondent, No. 8410;

Riverside Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8393;

Marquette Cement Manufacturing Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8371;

Calaveras Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8372;

Superior Portland Cement, Inc., a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8386;

Huron Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8373;

California Portland Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8402; and

Universal Atlas Cement Company, a corporation, petitioner, *vs.* Federal Trade Commission, respondent, No. 8399.

In addition to the matters so adopted by reference, petitioner asks leave to adduce the following items:

II.

Testimony set out in offer by Mr. Little, attorney for Superior Portland Cement, Inc., to the Trial Examiner on June 13, 1939, and reported in Tr. 21599, line 19, to Tr. 21602, line 14, inclusive, to prove by witness Percy I. Taylor that petitioner made f.o.b. mill bids to the Bureau of Reclamation on June 13, 1938, and April 26, 1939. This offer was rejected by the Trial Examiner, as reported in Tr. 21605. This offer was adopted by petitioner.

III.

Testimony set out in offer by Mr. Little, attorney for Superior Portland Cement, Inc., to the Trial Examiner on June 15, 1939 and reported in Tr. 21803, line 13 to Tr. 21816, line 15, inclusive, to prove by witness Admiral Peoples that petitioner made f.o.b. mill bids to the Procurement Division of the Treasury Department on proposals dated December 7, 1938, February 27, 1939, and April 19, 1939. This offer was rejected by the Trial Examiner as reported in Tr. 21818 and 21819. This offer was adopted by petitioner.

IV.

Testimony set out in offer by Mr. Shefelman, attorney for Petitioner, to the Trial Examiner on June 16, 1939, and reported in Tr. 21913, line 23, to Tr. 21920, line 19, inclusive, to prove by witness Walter B. Fry that the Interior Department, during the entire period covered by Mr. Fry's testimony on behalf of the Commission, had received numerous f.o.b. mill bids from the cement companies in Western Washington. This offer was rejected by the Trial Examiner as reported in Tr. 21922.

Dated at Seattle, Washington, March 17th, 1944.

Respectfully submitted,

S. Harold Shefelman,
Weter, Roberts & Shefelman,
1612 Northern Life Tower,
Seattle 1, Washington,
Attorneys for Petitioner.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Cement Institute, *et al.*, *Petitioners,*	Cases No.	
	8360	8389
	8361	8393
vs.	8371	8399
	8372	8402
Federal Trade Commission,	8373	8409
Respondent.	8386	8410

MOTION TO PRINT DESIGNATED PORTIONS OF ORAL TRANSCRIPT AS APPENDICES TO RESPECTIVE BRIEFS OR IN ALTERNATIVE TO EXTEND TIME FOR COUNTER DESIGNATION; ALSO TO EXTEND TIME FOR ANSWER TO MOTIONS TO ADDUCE ADDITIONAL EVIDENCE.

Comes now the Federal Trade Commission, respondent herein, and by its counsel respectfully moves the Court as follows:

1. That an order be entered to the effect that for the purposes of this case Rule 36(5) of this Court be waived with regard to designations and counter designations of the oral transcript to be printed and that in lieu thereof all parties be required at their own expense to print as appendices to their respective briefs the portions of such transcript and also of the exhibits on which they rely.

As the result of the petitioner's motion of December 27, 1943 and the Court's order of January 25, 1944 petitioners have been relieved of the expense and responsibility of printing any of the exhibits on which either respondent or petitioners rely. Respondent has thus been put to the necessity of finding some way of getting before the Court in printed or other convenient form the exhibits on which it so largely relies. At the same time respondent has no desire to interfere with the printed presentation of the oral transcript on which petitioners so largely rely. It is believed that the above proposal is, under present circumstances, the only constructive solution of the problem of handling such a large record without inconvenience to the Court or prejudice to any of the parties. This procedure

would tend to reduce the total amount of printing to be done. For on the one hand it would permit respondent to print only what it deems necessary to meet what petitioners finally rely on in their briefs and would permit the elimination of printing as to matters which petitioners may not pursue beyond their Statements of Points. On the other hand this procedure would permit petitioners to print with their main briefs everything that they have just designated for printing under Rule 36(5) and with their reply briefs everything that they need to meet the evidence printed by respondent with its brief. In this way the chief objective of designation and counter designation under Rule 36(5) would be accomplished, the size of the printed evidentiary record would be kept to the lowest practicable minimum, and the convenience of the Court would be served.

This motion is made in lieu of a motion that otherwise would lie to the effect that the transcript of oral testimony be treated the same as the documentary evidence, that is, print none of it. It would be just as logical for respondent to urge that the physical record of oral testimony would be as convenient to the Court without printing any of it as the physical exhibits would be in the absence of some modification of the present directive of the Court to print none of them. The great size of the oral transcript is as good a reason for printing none of that part of the record as the great volume of the exhibits was for printing none of them.

2. In the event the above motion is denied respondent respectfully moves that it be allowed an extension of 60 days or until June 10, 1944 within which to file under Rule 36(5) its counter designation of the portions of the transcript of oral testimony to be printed. The grounds for this motion are that this is only a reasonable time in view of the great size of such transcript, comprising some 49,000 pages, in view of the 200 days granted to petitioners for that and other purposes, and in view of the fact that certain petitioners alone have just filed a volume of 248 mimeographed pages listing their designations of the oral transcript to be printed.

3. Respondent respectfully moves the Court to enter an order granting a 60 day extension or until June 10, 1944 within which to make answer to the motions of various petitioners for leave to adduce additional evidence.

Among the reasons for this motion are that the principal petitioners have filed a 63 printed page motion for leave to adduce additional evidence, covering 16 subjects and accompanied by 50 printed pages of appendices, and that other petitioners have filed similar motions that add substantially to the nature and materiality of the points that call for answer in such motions taken collectively. It is obvious that only a cursory and superficial treatment of very important matters could be given without such an extension as herein requested. If such points are to receive proper attention it is highly desirable that sufficient time be allowed.

Respectfully submitted,
Federal Trade Commission,
By: W. T. Kelley,
Chief Counsel.
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.
March 27, 1944.

(Endorsed: Filed Mar. 28, 1944. Kenneth J. Carrick, Clerk.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

California Portland Cement Company, *Petitioner,*
vs.
Federal Trade Commission, *Respondent.*
No. 8402

STATEMENT IN OPPOSITION TO MOTION FOR ORDER TO REQUIRE THAT PORTIONS OF TRANSCRIPT AND EXHIBITS BE PRINTED IN BRIEFS.

Petitioner opposes the motion of the Respondent for an order to require that it at its expense print the portions of the transcript and the exhibits on which it relies

as an appendix to its brief in lieu of printing as provided for by procedure now in effect.

In support of its opposition Petitioner adopts the statements and showings made and to be made by Petitioners in Cases Nos. 8360, 8361 and 8410.

If the Petition is granted in whole or in part Petitioner requests that it be not required to print as an appendix to its brief any portions of the transcript other than the portions which are designated by it and not by any petitioner in any other of the proceedings for the review of the same order or other than the portions designated in paragraph 1 of its designation of the portions of the transcript to be printed filed herein on or about March 20, 1944.

Dated: March 31, 1944.

Alex W. Davis,
Robert B. Murphey,
514 Pacific Mutual Building,
Los Angeles 14, California,
Attorneys for Petitioner, California Portland Cement Company,

(Endorsed: Filed April 3, 1944, Kenneth J. Carrick, Clerk.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Aetna Portland Cement Company, *et al.*, The Cement Institute, *et al.*, and Blaine S. Smith, *et al.*, *Petitioners*, —*against*— Federal Trade Commission, *Respondent.*	Cases Nos. 8360, 8361, 8410

ANSWER ON BEHALF OF PETITIONERS TO RESPONDENT'S MOTION TO PRINT DESIGNATED PORTIONS OF ORAL TRANSCRIPT AS APPENDICES TO RESPECTIVE BRIEFS OR, IN THE ALTERNATIVE, TO EXTEND TIME FOR COUNTER-DESIGNATION; ALSO TO EXTEND TIME TO ANSWER MOTIONS TO ADDUCE ADDITIONAL EVIDENCE.

Come now the petitioners herein, and by their counsel, submit this statement in answer to the motion of the respondent, Federal Trade Commission, to print designated portions of the oral transcript as appendices to the respective briefs or, in the alternative, to extend time for counter-designation and also to extend time to answer the motions made by petitioners to adduce additional evidence:

1. Petitioners have no objection to Paragraphs 2 and 3 of said motion.

2. Petitioners oppose Paragraph 1 of said motion on the following grounds:

(a) The pending motion is in effect a motion by counsel for the Federal Trade Commission to set aside and modify the order duly made and entered by this Court on January 25, 1944. This order was made on a motion, dated December 27, 1943, by petitioners following extended conferences between counsel for petitioners and counsel for Federal Trade Commission with a view to the presentation to this Court of a program for the simplification of this record and the reduction of the portions thereof which would have to be printed. This Court in its

order, dated January 25, 1944, approved this program. No ground for such reargument which could not have been urged four months ago when the matter was first before this Court is urged now. No reason for failing to raise the point then is stated now.

(b) Respondent states that as a result of the order of this Court, dated January 25, 1944, it has been put to the necessity of finding some way of getting before this Court in printed or other convenient form, the exhibits on which respondent states that it so largely relies. This point was raised by the Commission in opposing issuance of the order dated January 25, 1944. Petitioners pointed out at that time, in connection with the printing of exhibits, that any party might ask leave of this Court to print as an appendix to its brief any exhibits which it might wish to present to this Court in printed form.

(c) The procedure belatedly proposed in the pending motion by the Commission whereby there may be as many piecemeal presentations of the record as there are briefs would not serve the convenience of this Court or of the several parties. This is particularly apparent in a case such as this involving, as it does, a record of unusual size and a charge of a nation-wide combination directed against The Cement Institute, its officers and trustees, and seventy-five cement companies, and in which twelve petitions to review the order of the Federal Trade Commission are now pending before this Court.

Wherefore, petitioners respectfully pray that the relief requested in paragraph 1 of the pending motion of the Federal Trade Commission be denied.

Dated: New York, N. Y., April 3, 1944.

Donovan Leisure Newton & Lumbard,
By Breck P. McAllister,
Member of the Firm,
Attorneys for all of the Petitioners in the above entitled causes.
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(Endorsed: Filed April 3, 1944, Kenneth J. Carrick, Clerk.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

The Cement Institute, *et al.*, *Petitioners,* vs. Federal Trade Commission, *Respondent.*	Cases Nos.	
	8360	8361
	8371	8372
	8373	8386
	8389	8393
	8399	8402
	8409	8410

In the Matter of the Motion to Print Designated Portions of Oral Transcript as Appendices to Respective Briefs or in Alternative to Extend Time for Counter-Designation; Also to Extend Time for Answer to Motions to Adduce Additional Evidence.

SUGGESTIONS OF COUNSEL FOR MARQUETTE CEMENT MANUFACTURING COMPANY, PETITIONER IN CASE NO. 8371.

Under date of March 28, 1944, the Federal Trade Commission by W. T. Kelley, Chief Counsel, and Walter B. Wooden, Assistant Chief Counsel, filed a motion seeking to modify the order of this Court of January 25, 1944, which provided, among other things, that exhibits, written motions, petitions with supporting affidavits and statements, and "Contentions" need not be printed, but may be exhibited to the Court in this proceeding in their original form; and that, in making their designations of the portions of the transcript to be printed, the petitioners need designate only those portions of the record upon which they intend to rely as being in support of their contentions in this Court, and the respondent, Commission, shall designate the evidence upon which it intends to rely to support its "Findings as to the Facts and Conclusion" and "Order to Cease and Desist".

The effect of the Commission's motion, if allowed, would be to destroy the step toward simplification and material conservation of time, money, material and man power accomplished by the Court's order of January 25, 1944, and

instead to require the parties to each of the twelve separate petitions to review the Orders of the Trade Commission involved, at their own expense, to print, as appendices to their respective briefs, the portions of the transcript of the oral record and the exhibits upon which they rely to sustain their respective contentions.

In suport of the motion, counsel for the Commission argue that this procedure which they have lately evolved "Would tend to reduce the total amount of printing to be done." It is the right of the petitioners in each of the twelve separate cases to file separate briefs, and it is but natural to expect that they will do so. One such petitioner, Huron Portland Cement Company, in opposition to the Commission's motion of March 27, 1944, has pointed out that Huron, in its petition to review, asserts that there is no proof in the record which supports a finding that Huron is a party to any combination, agreement or conspiracy as charged in the complaint, and, therefore, under the procedure now for the first time urged in the Commission's motion, Huron would be compelled to print with its brief all the testimony and exhibits in the record, or at least all the testimony and exhibits put in by the Commission. If such a situation is true as to Huron it would be true as to each of the other petitioners.

On the face of it, allowance of the Commission's motion would require a separate printing of oral testimony and exhibits as an appendix to each petitioner's brief. Thus there would be unavoidable duplication and piling up of a stupendous mass of printed matter. Selections of the various petitioners from the 49,000 page transcript of oral record and the 50,000 page record of exhibits, would present such a massive mess that no Court should be expected to find its way through the separate and overlapping volumes.

The Court has already very wisely dispensed with the printing of exhibits. As to the Commission's argument that as a result of that Order of the Court, it has "been put to the necessity of finding some way of getting before the Court in printed or other convenient form the exhibits on which it so largely relies," it is respectfully suggested that the Report of the Commission, presumably made pursuant to the requirements of Section 5 of the Trade Commission Act, is a bound, printed booklet, containing under

the heading, "Findings as to the Facts and Conclusion", 132 pages. This document contains only a few recognizable findings of fact. It largely consists of copious excerpts and direct quotations from numerous exhibits. These do not constitute findings of fact, but they do show that the Commission has already found a "way of getting before the Court in printed * * * form the exhibits on which it so largely relies" to support its "Findings as to Facts" and its "Order to Cease and Desist." There are, for example, approximately 293 exhibits from which excerpts and quotations appear, and these excerpts and quotations constitute approximately 67 pages of the Commission's Report. This Report, with its copious excerpts and quotations from exhibits, will necessarily be a part of the printed record.

This petitioner now respectfully refers to the suggestions which it filed on January 12, 1944, in connection with the motion for condensation of the printed record filed on December 27, 1943, in Cases Nos. 8360, 8361 and 8410, and, more particularly, petitioner refers to the case of *National Harness Manufacturers Association* v. *Federal Trade Commission* (C. C. A. Sixth, 1919, 261 Fed. 170), in which case the Manufacturers Association petitioned for a review of a cease and desist order of the Commission and moved to dispense with the printing of the entire record, and the record not having been printed, the Commission moved to dismiss the petition for review. The Court said:

> "We think our previous order, which assumed that printing was necessary and thereupon declined to dispense with it entirely, did not sufficiently take into account the character of this proceeding. Our rule 19 (202 Fed. xiii, 118 C. C. A. xiii) provides for the printing of all records, but contemplates only records in those proceedings to which the body of the rules is applicable, viz., records on writs of error or appeals or on some specified petitions. In all these cases the record has been prepared under some supervision which insures printing only the essential parts. This rule 19 should not be interpreted so as to require printing at large such a record as this. By the provisions of this act, the commission conducts a general investigation and takes proofs; there is no judicial regulation of the reception of evidence. Thereupon the commission makes a finding of facts and an order. If the order is not observed, the commission may apply to this court

for a mandatory order of enforcement, and file in this court a copy of the entire record and of its finding of facts. In case of such application, there is a provision for taking further testimony, to be ordered by this court, at the request of either party. In case the defendant feels aggrieved by the order of the commission, he may file a petition in this court for review, and the commission is required to file the transcript of the record. The court then has the same duty of review as if the commission had brought the matter here.

"The provision regarding further proofs indicates that the transcript first filed is not of the permanent character of ordinary transcripts, and that the printing of parts of the original might be rendered inadvisable by later proofs; and though this provision for further proofs does not in terms apply to a defendant's applicaiton for review, we should hesitate to construe our printing rule as applicable to one and not to the other method of review.

"The statute further provides that the finding of facts by the Commission shall be conclusive, if supported by any evidence. It follows that there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject. The statute further provides that the proceedings shall be in every way expedited and shall be given precedence over all other cases pending.

"All these considerations persuade us that there should be a revision and condensation of the transcript before it is printed. We think a satisfactory practice will be obtained by following the analogy of general equity rule 75 (198 Fed. x., 115 C. C. A. xl). The order, therefore, will be that the former order refusing to dispense with printing be vacated; that the petitioner, within 30 days, prepare and serve upon the commission a statement of such parts of the record as the petitioner thinks should be printed, including a condensed narrative of so much of the testimony as is material to the points to be raised; that within 30 days thereafter the commission propose such amendments to such statement and narrative as it thinks proper; and that, if the parties do not thereupon promptly reach an

agreement as to the record necessary to be printed, the latter be brought to the further attention of the Court."

We further direct the Court's attention to the argument made by the Commission in its answer to the motion for simplification of the record, of December 27, 1943. Therein the Commission said "most of the findings and conclusions of the Commission are based primarily upon the evidence contained in the exhibits" and "the transcript of oral testimony on which it would rely is largely supplementary and explanatory of the documentary evidence", and argued that "since much of the oral testimony on which the respondent (the Commission) relies is built upon and around the exhibits, there would be no object in designating such testimony for printing unless the exhibits to which it relates are also printed." The foregoing statements by the Commission were based upon matter peculiarly within the exclusive knowledge of counsel for the Commission. The Commission introduced approximately 3,000 exhibits, containing many more thousands of pages as the result of grouping a number of documents under one exhibit number.

Petitioner respectfully suggests that it is essential that such a record be simplified and condensed to the point where it will be physically possible for the Court to cope with it. To do this the Court should require the Commission now to specify the particular exhibits upon which it relies, if any there be, in addition to those which it has already specified in its Report, upon which it relies, and also to segregate in its designation for printing, such portions of oral testimony, if any there be, in addition to the portions it has referred to in its Report, upon which it relies. Thereafter, it will for the first time be apparent to what extent the petitioners may assist in the indispensable simplification of the excessively huge record and its reduction to a practical size. Thus the printed record may be selected by the rule of what is germane and relevant to the exhibits specified and the oral testimony designated by the Commission.

As to the alternative motion of the Commission that it be allowed an extension of sixty (60) days or until June 10, 1944, within which to file its counter-designations of the portions of the transcript of oral testimony, this petitioner has no objection, but respectfully suggests that this

extension of time be made so as to allow the Commission to comply with an order directing it to specify the exhibits upon which it relies, if any, in addition to those already printed by it as a part of its Report, and to segregate, in its designation of the oral testimony to be printed, those portions of the testimony thus designated, if any in addition to its report, upon which it relies, together with the exhibits, to support its Findings of Fact.

Respectfully submitted,
Zimmerman and Norman,
Counsel for Petitioner, Marquette Cement Manufacturing Company, in Case No. 8371,
By Edward A. Zimmerman,
a Partner.

Endorsed: Filed Apr. 6-1944 Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Universal Atlas Cement Company, a corporation, *Petitioner,* *vs.* Federal Trade Commission, *Respondent.*	No. 8399.

ANSWER OF UNIVERSAL ATLAS CEMENT COMPANY TO THE "MOTION OF FEDERAL TRADE COMMISSION TO PRINT DESIGNATED PORTIONS OF ORAL TRANSCRIPT AS APPENDICES TO RESPECTIVE BRIEF OR IN ALTERNATIVE TO EXTEND TIME FOR COUNTER DESIGNATION; ALSO TO EXTEND TIME FOR ANSWER TO MOTIONS TO ADDUCE ADDITIONAL EVIDENCE".

Universal Atlas Cement Company, petitioner in the above case, hereby adopts the answer made by petitioners in the case entitled "Aetna Portland Cement Company, et al.

vs. Federal Trade Commission, No. 8360," to the motion filed by the Federal Trade Commission entitled "Motion to Print Designated Portions of the Oral Transcript as Appendices to Respective Briefs or in Alternative to Extend Time for Counter Designation; Also to Extend Time for Answer to Motions to Adduce Additional Evidence," and asks that the Court enter the same order in the above entitled cause as it shall enter on the motion and said answer of said petitioners in said other case entitled "Aetna Portland Cement Company, et al. *vs.* Federal Trade Commission, No. 8360."

Universal Atlas Cement Company,
By Knapp, Cushing, Hershberger
and Stevenson,
John H. Hershberger,
Its Attorneys.

April 6, 1944.

Endorsed: Filed Apr. 6-1944 Kenneth J. Carrick, Clerk.

And to-wit, on the eighth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

April 8, 1944

8360, 8361, 8371, 8372,
8373, 8386, 8389, 8393,
8399, 8402, 8409, 8410.

(Caption)

Before, Hon. William M. Sparks, Circuit Judge.

It is ordered that paragraph No. 1 of Respondent's motion herein asking that designations be waived and that all parties print the portions of the transcript on which they rely as appendices to their briefs be, and it is hereby, denied.

It is further ordered that paragraphs Nos. 2 and 3 of said motion, asking that time for respondent to file its counter-designation of record and to answer petitioners' motions for leave to adduce additional evidence be extended to June 10, 1944, be and they are hereby, granted.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

	Cases Nos.	
The Cement Institute, *et al.*, *Petitioners,*	8360	8389
	8361	8393
vs.	8371	8399
	8372	8402
Federal Trade Commission, *Respondent.*	8373	8409
	8386	8410

STATEMENT IN RESPONSE TO PETITIONERS' ANSWER TO RESPONDENT'S "MOTION TO PRINT DESIGNATED PORTIONS OF ORAL TRANSCRIPT AS APPENDICES TO RESPECTIVE BRIEFS OR IN ALTERNATIVE TO EXTEND TIME FOR COUNTER DESIGNATION; ALSO TO EXTEND TIME FOR ANSWER TO MOTIONS TO ADDUCE ADDITIONAL EVIDENCE."

Comes now the Federal Trade Commission, Respondent herein, and by its counsel submits this statement in response to the answer submitted by petitioners in partial opposition to respondent's motion above referred to.

The petitioners consent to the entry of the order requested by respondent in the motion referred to with respect to paragraphs 2 and 3. This statement, therefore, will be addressed to the petitioners' opposition to paragraph 1 of the motion.

The petitioners oppose respondent's motion insofar as it requests an order to print designated portions of the oral transcript as appendices to the respective briefs on the following grounds:

1. That the pending motion is, in effect, a motion to set aside and modify the order duly made and entered by this Court on January 25, 1944.

2. That respondent does not need the relief asked for in paragraph 1 of its motion since any party might ask leave of Court to print as an appendix to its brief any part of the record which it might wish to present in printed form.

3. That the procedure proposed in the pending motion would result in as many piece-meal presentations of the record as there are briefs to be filed and would not serve the convenience of this Court or of the parties.

Counsel for the Commission desire to make clear that they are asking this Court for an order which would give the relief indicated by each of the provisions outlined in paragraphs 1 and 3 of the pending motion. They do not wish the Court to conclude that any relief granted under paragraph 2 of the pending motion would be considered by the respondent as equally satisfactory with the relief asked under paragraph 1. The relief asked in paragraph 2 will not be needed or desired if the relief asked in paragraph 1 is granted.

Through the pending motion and this statement we are simply moving the Court to enter an order that there be done what petitioners once stated to the Court could be done, i. e., if the Court would invoke its Rule 35, subsection 4, dispense with "the printing of a composite separate record" and order that "the record shall be printed by counsel as an appendix or supplement to the brief" (see page 5 of Statement On Behalf Of Petitioners In Response To Respondent's Answer To Petitioners' Motion For Simplifying The Record And Reducing The Portions Which Have To Be Printed" filed in this Court January 10, 1944).

It is obvious that petitioners need print but one appendix or supplement to their briefs. There is nothing to prevent counsel for petitioners from collaborating with a view to adopting or relying upon the whole or any part of any appendix or supplement printed by counsel for any petitioner any more than there is in adopting or relying upon a composite designation of the transcript. Such collaboration would avoid all duplication and save time, expense, and materials.

Therefore it follows that granting the pending motion would not in any respect be contrary to the order entered by this Court January 25, 1944 for simplifying and reducing the record to be printed but would further the purpose of the Court in its entry of that order.

The Court, through the entry of an order such as is sought by paragraph 1 of the pending motion, would relieve the petitioners of much printing expense through the Commission's assumption of a large part of that expense.

This is an expense which they represented to the Court in their motion of December 27, 1943 that they desire to reduce. Such order would also conserve time, money, material and manpower, results which petitioners have stated they desire to accomplish. It would also provide the Commission with a method by which the documentary evidence in the record can be presented to the Court in a form as conducive to convenient reading and study by the Court as the oral testimony. Counsel for the Commission urge that such a method be provided for the following reasons:

Much of the documentary evidence in the record is in the form of writings of petitioners antedating the institution of this proceeding. They contain damaging admissions made at a time when petitioners had no reason to believe such admissions would be used against them. The oral testimony of petitioners, and upon which they so largely rely, is their own self-serving testimony shown by the record to have been studiously prepared and carefully rehearsed in written form before being offered for the record as testimony. It is therefore obvious why counsel for the Commission now seek by the pending motion an equality of status for what they regard as the most credible part of the record and upon which they so largely rely: i. e., the documentary evidence in the form of writings of petitioners before this case was instituted.

Respectfully submitted,
Federal Trade Commission,
By: W. T. Kelley,
Chief Counsel,
per WBW,
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.,
April 8, 1944.

Endorsed: Filed Apr 10 1944 Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8360-8361-8410.) * *

ANSWER IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

(Filed Jun 8, 1944. Kenneth J. Carrick, Clerk.)

Come now counsel for the Federal Trade Commission, respondent herein, and oppose petitioners' motion for leave to adduce additional evidence. Petitioners in Cases Nos. 8372, 8386, 8389, 8393 and 8399 have adopted by reference and joined in the motion to which answer is made herein. Accordingly no separate answers are made to the motions of those petitioners so far as they involve adoption of the present motion. As grounds for their opposition counsel for the Commission present the following:

Petitioners' motion comprehends 16 classes or categories of evidence which they contend were erroneously excluded from the record by the trial examiner and the Commission. These 16 categories include some 243 separate documents and the testimony and offers of proof relating thereto and in addition some 50 instances of excluded oral testimony and petitioners' offers of proof made in that connection. The broad scope of the motion is in keeping with the petitions for review which contemplate that the Court will review each and every alleged error in the exclusion or admission of evidence. A very much larger number of alleged errors in the admission of evidence are being urged upon the Court by petitioners as indicated by their Statement of Points, pages 89-110.

All of the additional evidence covered by the motion of these petitioners consists of evidence that was proffered before the trial examiner and which was rejected or excluded by him, such rulings being subsequently confirmed by the Commission. None of this additional evidence consists of matters that were not proffered before the trial examiner and the Commission.

1. The excluded evidence not only fails to give rise to any inference of lack of fair hearing or due process, but it was properly excluded on legal grounds.

Taking up first the 16 categories into which petitioners have divided their excluded evidence, the reasons for its exclusion will now be shown. The 16 categories appear in petitioners' motion as "subjects" and each "subject" carries a title which will be used for the purposes of this portion of the answer.

"Subject I. Explanation of bids, tabulations of which were received in evidence."

Petitioners concede (motion p. 24) that "a considerable amount of such evidence was received on behalf of some petitioners," but complain that "a large amount was excluded as to many petitioners and as to some petitioners substantially all evidence of this character was excluded." They further complain that "these petitioners, as well as all others to whose benefit such evidence would accrue, have been deprived of a full opportunity to defend themselves." They thus correctly imply, but omit to state, that all petitioners were given the benefit of such evidence of this sort as was received. None of such excluded evidence was in derogation of but instead confirmed the fact that the various petitioners used the basing point system as alleged in the complaint and that the identity or matching of delivered prices in their sealed bids resulted from such use. Methods by which petitioners kept themselves informed of changes in base prices without direct and systematic intercommunication had been fully shown during the course of testimony in support of the complaint. The trial examiner properly curtailed the amount of such cumulative testimony which amounted to no more than self-serving assertions by petitioners that their use of the basing point system was not the result of agreement and concerted action. Much more of such testimony than was actually excluded could have been properly excluded. No possible harm has resulted to petitioners by such rulings by the trial examiner and the Commission.

It is neither necessary under the terms of the statute nor is it practicable for the Court to review and resolve the merits or examine the correctness of the conflicting claims of opposing counsel regarding the exclusion of such evidence.

"Subject H. Evidence of f.o.b. mill bills or sales, and evidence showing the requests of public purchasing agencies for delivered prices."

Petitioners state (motion p. 26) that they were prevented from meeting a charge of thwarting the efforts of government officials to obtain f.o.b. mill prices by the trial examiner's action "in rejecting evidence offered by petitioners showing literally hundreds of f.o.b. mill bids where such bids were requested." They also state (p. 27) that petitioners "made hundreds of unqualified f.o.b. mill bids to government agencies, both before and after the date of the complaint when requested and when other conditions of the invitation could be met."

These statements are simply not true. They rest upon petitioners' persistent contention throughout the case that when an f.o.b. mill price figure is derived from or keyed into a delivered price figure determined under the basing point system, it is nevertheless a genuine f.o.b. mill price. The record already contains numerous, probably hundreds, of such alleged bur spurious f.o.b. mill bids, and obviously it would avail petitioners nothing to have more of them added to the record. For the inconclusiveness of petitioners' classification of some such bids as genuine f.o.b. mill bids see Transcript 21626, 21641, 21643, 21654. To determine the merits of petitioners assertions above quoted would require the Court to study a question made doubly complex by petitioners devious efforts to maintain the basing point system of identical or matched delivered prices and yet claim to be freely pricing on an f.o.b. mill basis which would make such identity and matching impossible. Such a contention does not come with good grace from a group of competitors which unitedly refuse the request of the President of the United States that they make f.o.b. mill bids to the Federal and State governments (see Findings of Fact, pp. 35, 36, 43). Among other things the directors of The Cement Institute, sitting as The Code Authority, voted to refuse the President's request (Comm. Exs. 6A, B, Vol. 1; 559B, Vol. 10). If some of the other unchallenged and uncontradicted original evidence on this subject should be desired as distinguished from that set forth in the Findings of Fact, reference is made to Commission's Exhibits 553Z, Vol. 10; 1893 Vol. 36; 1895A Vol. 36; 2189A-B, Vol. 38; 1113A-B, Vol. 28; Tr. 10222, 12812, 12520.

There is also the time element to be considered. There is no contention that Federal agencies had always been unable to avoid the effect of petitioners' matched delivered price bidding. At one time they were able to get some of the benefits of f.o.b. mill bidding by deducting commercial freight from the destination price. The full effect of the inability of such agencies to get the benefit of f.o.b. mill bidding was noticeable only after the N.R.A. Code when petitioners' so-called "control clause" prevented the government from deducting commercial freight (See Findings of Fact, p. 44).

The Court would have to go into all these and like factual details in order to resolve the issue between the above quoted assertions of petitioners and our unequivocal assertion that the record shows not a single exclusion of any genuine or "unqualified" f.o.b. mill bid made prior to the complaint and that the items excluded are merely cumulative evidence of what the record already contains in great abundance.

Again petitioners complain (p. 26) of the trial examiner's action "in rejecting incontrovertible evidence that public purchasing agencies generally request that they be quoted delivered prices." The reason for such rejection was that the evidence offered by counsel for the Commission in support of the complaint already showed this was true and counsel for the Commission never disputed it and do not dispute it now. But this carries no implication, as petitioners would suggest, that such agencies were thereby requesting identical or matched delivered price bids or the use of the basing point system for that purpose. In fact when they made such requests they were seeking competitive delivered price bids. Moreover, on a number of occasions disclosed by the record, they did request f.o.b. mill bids in order to get competition, but such requests were frustrated by petitioners.

It is presumptuous for petitioners to take up the Court's time with assertions of error in the exclusion of evidence on this last matter which the record already establishes abundantly and which has never been disputed by their opponents. It is a further illustration of the unsoundness of petitioners' position that they are entitled to a review of each and every alleged error in the exclusion or reception of evidence.

"Subject III. Non-collusion on specific changes in price."

This subject is only a subordinate aspect of Subject I. The record evidence adequately covers the point which petitioners urge here as to the way these specific changes in price came to their attention, namely, through information picked up in the field from their respective customers, that is, except during the period of their N.R.A. Code price filing systems when there was a systematic interchange of price changes. But it all confirmed the fact as the excluded evidence would have done cumulatively, that the specific changes in price were pursuant to the operation of the basing point system and that this almost immediately brought about identity or matching of delivered prices on the new price level.

Petitioners in effect concede the harmlessness of the exclusion of such evidence when they say (motion p. 31) that the Commission found that there has been no "systematic exchange" among petitioners "of basing point prices or changes in such prices." They correctly say (p. 32) that "this evidence was excluded in most instances as repetitious of oral testimony or as covered by the general evidence." Thus they ask the Court to review the discretion of the trial examiner as to the amount of cumulative evidence that should be received on a given subject.

"Subject. IV. Economic reasons for petitioners' pricing practices."

The excluded evidence in this category, as described by petitioners (p. 33) is obviously irrelevant to the issue of collusion in the use of petitioners' basing point system of matched or identical delivered prices and it was properly excluded on that ground. How could the freight rate maps, decisions of the Interstate Commerce Commission, and freight rate scales which make up this category possibly tend to show that petitioners were not collusively maintaining a system of delivered prices under which buyers were unable to get a lowered delivered cost from one mill than from another? Conspirators naturally take all such matters into account but the mere existence of such matters tends neither to prove nor to disprove the existence of collusion. They could not possibly account for even that identity or matching of petitioners' delivered

prices which reflects and requires an arbitrary equalization of varying freight factors by petitioners and which the railroads have nothing to do with.

"Subject V. Independent action on prepayment of freight."

The irrelevancy and immateriality of the evidence in this category are apparent from the fact that it relates to matters that occurred more than two years after the complaint was issued. Even though assumed to be independent action it is irrelevant to the charge of prior collusion to prevent that diversion of shipments in transit by consignee-buyers which was an effort to defeat petitioners' basing point formula. The record already shows that information as to this change to a prepayment basis was picked up in the field from customers and this was brought out by Commission's counsel. All petitioners had the benefit of such testimony just as they had the benefit of similar testimony about picking up information in the field from customers with regard to the matters covered by Subject III of the motion. Petitioners now complain because they were not allowed to put in what would have been merely cumulative evidence on a matter occurring long after the complaint and which therefore could not afford any basis for disposition of the case. Petitioners espouse the fallacy that it could afford such basis when they say (p. 35) that "it defeats the charge of collusion 'to eliminate * * * diversions in transit' as a 'means whereby the * * * pricing system may be impaired,' and the findings to like effect."

The implied claim (p. 34) that petitioners were unfairly treated with regard to evidence of other matters occurring subsequent to the complaint will be answered later in connection with those other matters.

"Subject VI. Dealer opposition to the disapproval of trucking."

This excluded evidence is wholly immaterial on the face of petitioners' own motion (p. 36). They concede that the Commission's findings of fact contain a finding that "dealers began to oppose * * * and * * * did not want" trucking. In other words, if the excluded evidence

were to be admitted, it would afford no basis for a finding other than has already been made. Petitioners of course not only want the evidence admitted but want the Court to weigh it and then conclude that it outweighs and overcomes the evidence in the form of petitioners' own written admissions and which underlie the Commission's finding that "the effect of trucking on prices * * * was the motivating cause" of petitioners' policy.

Petitioners also say that there are findings to the effect that some dealer organizations opposed trucking and that counsel for the Commission conceded that some dealers also opposed it. They correctly say that this evidence was excluded on the various grounds named, including "the admission by Commission counsel that some dealers disapproved of trucking and as relating to an uncontroverted subject" (p. 37). The conceded fact that individual dealers opposed trucking rendered immaterial, cumulative and unnecessary the excluded evidence. Petitioners can argue from that concession if they care to that the findings on this subject are not supported by the evidence, just as effectively as though none of the evidence in question had been excluded.

"Subject VII. Comparative cost of truck and rail delivery."

This excluded evidence is not material. There has been no charge or finding that trucking rates have invariably been lower than rail rates, though the record of petitioners' own writings and actions was overwhelmingly to the effect that for the shorter hauls truck rates were generally lower. It is immaterial that this may not always be the case and the excluded evidence could have gone no further than to show that in some instances it was otherwise.

Petitioners point out that Commission counsel conceded that some deliveries are made by truck and that where the trucking rate exceeded the rail rate the difference was absorbed (p. 38). This refers to the undisputed and undisputable fact that petitioners' matched delivered prices are calculated and their basing point system is operated on a rail rate basis and not on trucking rates, which is a further ground for holding this excluded evidence irrelevant and immaterial.

"Trucking costs" are distinguished from "trucking rates" in that they relate to petitioners' own cost of delivery in their owned or controlled trucks and were of course "not in issue" because such truck delivery could not menace petitioners' control of their delivered prices. Moreover the Commission's findings (par. 11(b)) give appropriate weight to evidence received in petitioners' testimony regarding alleged reasons for their opposition to trucking other than its effect on the price structure.

"Subject VIII. Comparative cost of rail and water delivery."

The status of this excluded evidence is similar to that treated under the preceding subject. Petitioners do not even suggest that the cost of delivery by water is always or generally greater than by rail, but merely that "the cost of water transportation of cement, which requires rail connections, is sometimes greater than all-rail" (p. 39). As shown by petitioners' offer of proof (p. 65) even this excluded evidence showed that the all-rail rate was sometimes greater than the rail-water rate to given points, and that alone would support the conclusion that delivered prices based on the all-rail rate deprived buyers at those points of the benefit of cheaper transportation as an element in such prices. Petitioners made no attempt to dispute the generally known fact that all-rail rates are usually higher than all-water rates.

There was no finding such as petitioners allege (p. 39) that paragraph 26 of the Commission's findings of fact is to the effect that petitioners "while availing themselves of 'these cheaper means of delivery' 'prevent purchasers from * * * obtaining benefits' ". The finding is that the capacity, tendency, and effect of petitioners' entire combination was, among other things, to prevent purchasers "from obtaining benefits which might accrue" from the use of water carriers. However, petitioners' own written reports, received in evidence, establish that the cost of water transportation is frequently lower than rail and that this operates to give them a form of "phantom freight" by the amount of such difference. It is immaterial that water transportation may not be invariably lower than rail, which is admittedly all that petitioners' proffered evidence could add up to. It could not even

amount to that because the comparison was not between all-rail and all-water rates but between all-rail and rail-water rates.

"Subject IX. Reasons for Lingeman's resignation and Cree's discharge."

Petitioners' take occasion in this connection to make statements that have not the slightest relevancy to the exclusion of the evidence listed by them in this category. And some of the exhibits listed have no connection with the subject.

Petitioners go out of their way to impugn Mr. Cree's veracity by saying (p. 40) that "his veracity was badly shaken on cross-examination and vigorously attacked by impeaching witnesses to the extent permitted by the Commission." Counsel for the Commission challenge that statement in every particular. No attack was made upon Mr. Cree's veracity in the sense of his not being a truthful man and it withstood every attack made upon it in the sense of his testimony not being accurate. It was backed up by a mass of uncontradicted company records, some of which are set forth at pages 62-66 of the Findings of Fact.

The implication of petitioners' statements on this subject is that they were precluded from showing that the resignation of Lingeman and the discharge of Cree might have been due to reasons other than that found by the Commission, which was that they would not "conform to the pricing and marketing practices established by the respondents." As a matter of fact F. R. Johnson, president of the Aetna Company, who discharged Cree and called for Lingeman's resignation, was permitted to testify at length on the very matters which petitioners now say they were prevented from introducing evidence upon, namely "Lingeman's ill health, their joint inefficiency and poor management, and the resultant heavy losses to the company" (p. 40) (See Tr. pp. 987; 990; 1006; 1015; 1062-1068). Petitioners' counsel referred to such testimony of Mr. Johnson at the time these very exhibits were excluded (Tr. 29478).

The particular exhibits and testimony listed by petitioners in this category were excluded not because of their bearing upon Cree's discharge but because of the incompetent form in which they were presented. The trial examiner properly ruled (Tr. p. 29421) that the witness Bolster

could testify to anything tending to show a legitimate motive for discharging Cree. Petitioners then attempted to show by the witness as they had through President Johnson that the financial results under Cree and Lingeman had been unsatisfactory (Tr. pp. 29422; 29423). Petitioners' Exhibit 1831A-B turned out to be a copy of a letter from an accounting firm containing certain figures which the witness had not checked with the company's books but only with the auditor's reports. He could not even name the auditor or give his address (Tr. 29979; 29982; 29985; 6; 7).

Petitioners' Exhibits 1985-1991 have no relation whatever to the Lingeman-Cree matter and related to other matters occurring several months after their separation (Tr. 30064; 5). Their lack of relevancy to this subject is indicated by the fact that petitioners have included them also under Subject III (motion p. 31). The trial examiner stated that if "there is the slightest bit of information contained therein on which you could base a useful inference, I shall receive them" (Tr. 30066) but nevertheless excluded them after inspection. Commission counsel conceded on the record (Tr. p. 30067) that the record already showed the substance of the offer of proof that appears at page 68 of petitioners' motion.

"Subject X. Railroads as source of land grant information."

The implication of petitioners' inclusion of this subject and of their statements concerning it is that they were unfairly precluded from showing that land grant information was obtained from railroads. As a matter of fact the record made by Commission counsel is packed with evidence that the railroads were the principal original source of petitioners' information, although petitioner Institute became the common agency for circulating it. This is partially shown by petitioners' own statement (motion p. 42) that the evidence was excluded as "nothing but familiar information" and by their recital of Commission counsel's statement on the subject.

The point is that such information was admittedly inaccurate, as shown by the Institute's circular quoted on page 48 of the Commission's findings. The findings also state (p. 47) that some of the land grant information was secured

from railroads. One may well wonder why petitioners should think there is any merit or substance to the claim that the exclusion of such evidence was erroneous under the circumstances, how they could be prejudiced by it in view of the findings, or how it could add anything to a charge of denial of fair hearing or due process.

"Subject XI. Reasonableness of shipment distances and cross hauling."

Any issue in the case as to the reasonableness of shipping distances is wholly collateral to the question whether there is a combination to fix and match delivered prices which are presumably higher than if competitively arrived at and thus would obviously permit shipping greater distances than under competitive pricing. The effort to show that one mill shipped 80 percent of its output within 125 miles is obviously irrelevant and immaterial on that question. The grounds for its exclusion as stated by petitioners (p. 43) are sufficient and included incompetency. But the witness was permitted to testify from his own general knowledge that 50 percent of his output was sold within a hundred mile radius (Tr. 27993). Exclusion of the exhibit was not in violation of the stipulation referred to by petitioners and the trial examiner so stated (Tr. 27989; 27990).

Petitioners' Exhibit 2062 was excluded because the witness had not prepared it yet the trial examiner permitted the witness to testify of his own knowledge that the shipments outside the State amounted to 7 or 8 percent (Tr. 30492; 3; 4; 5; 7; 30498; 9).

"Subject XII. Independent action on specific changes in market price."

By their own statement (p. 45) petitioners here ask the Court to review the trial examiner's discretion in excluding this evidence "as cumulative and a waste of time" and in ruling that "we are not to receive any more of these reports from the field about the dealer reaction." The record already contains a huge quantity of evidence falling in this category, abundant for all of petitioners legitimate purposes. Yet they complain of lack of fairness in not being allowed to make the huge record still larger by cumulative proof.

"Subject XIII. Post-complaint matters on which Commission was permitted to introduce evidence and respondents were not."

Petitioners divide this category into 5 parts, the first four of which had already been treated by them under Subjects II, V, and VII of their motion. Partial answer has likewise been made to them under those subjects herein. Regarding the fifth part, the "equalization clause" referred to as used after complaint was quite different from the "control clause" used before and continued after the complaint. It was properly excluded as irrelevant to the issues raised by the complaint. It could not in the nature of things disprove what occurred before the complaint.

The trial examiner's ruling quoted from (motion p. 48) was correct and proper. Petitioners were always accorded the right to rebut any specific evidence that showed a continuation after complaint of any practice charged or brought in issue under the complaint. They are now complaining because they were not permitted to attempt a showing that in other wholly separate and independent instances they did not continue a practice after complaint with the same degree of unity as before. Such separate instances could not offset other separate instances to the contrary. It is like putting forward instances where a man paid his debts to offset instances where he was being sued for non-payment. Neither partial nor complete discontinuance of the alleged combination or a challenged practice after complaint would be relevant and material. On the other hand, either the partial or complete continuation after complaint of the alleged combination or of a challenged practice is decidedly relevant and material. Conspiracy is by its nature a continuing offense. Petitioners' characterization of the trial examiner's ruling as typical of "the inequitable treatment" accorded them rests upon the baseless implication that they were not allowed to rebut the specific evidence that was offered to show continuation. Such characterization shows that petitioners are not merely attacking this ruling as erroneous but as a typically unfair one by which they were denied a fair trial and due process.

"Subject XIV. Fairness of price."

The relative importance of this subject in petitioners' minds is shown by the fact that it occupies 10 printed pages of their motion, as against 4 pages for the next largest subject. The position of counsel for the Commission on this subject has been and is that the existence or non-existence of an unlawful price fixing combination cannot be determined by evidence that the price is "fair," and that if and when the existence of such a combination is shown by other competent evidence, the price becomes ipso facto unfair and unreasonable. In essence that is all that the complaint and the findings to which petitioners object add up to. This position is supported by the Supreme Court in Socony-Vacuum Oil Co., et al. v. U. S., 310 U. S. 150 (1940), the opinion in which was handed down while hearings were in progress before the trial examiner. This merely clarified and amplified that court's ruling to a similar effect in the Trenton Potteries case.

Referring to a contention in the Oil case similar to that of petitioners here, the Court said:

"Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

"The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to de-

stroy or drastically impair the competitive system" (p. 221).

The Court accordingly held there was no error in the refusal to charge the jury that it must find that "the resultant prices were raised and maintained at 'high, arbitrary and non-competitive levels.' The charge in the indictment to that effect was surplusage" (p. 222). Any similar allegations in the complaint herein could be similarly characterized and with greater reason. The indictment charged that defendants "conspired together to raise and fix the prices on the spot markets; raised, fixed and maintained those prices at artifically high and non-competitive levels and 'thereby intentionally increased and fixed the tank car prices' * * * and 'in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area' " (p. 250). The complaint herein did not go anywhere near that far.

The Court held as to certain offers of proof that "to the extent that they were designed to show that respondents by their buying programs had not raised the spot market prices to an artificial and non-competitive level, these offers of proof were properly denied as immaterial. For, as we have said, the reasonableness of prices and the fact that respondents' activities merely removed from the market the depressive effect of distress gasoline were not relevant to the issues" (p. 229).

It is submitted that the above quoted opinion is decisive and conclusive against petitioners' contention that the evidence in this category was relevant and material. It is obvious on the face of it and as a matter of plain reason that neither the existence nor non-existence of a price-fixing conspiracy can be determined from such evidence as costs, profits, losses, reproduction cost of plants, the relative cost of cement to that of other building materials, the relation between costs and volume and marginal returns, and the remainder of the 13 classes of excluded evidence which petitioners have marshalled under this subject of "Fairness of price."

Petitioners make the statement (p. 49) that "the record is replete with evidence offered and received on behalf of the Commission bearing on the subject of the reasonableness of cement prices." That is not true if they mean that any attempt was made to prove or infer the existence of the alleged price-fixing combination by showing that the

prices or profits were unreasonable. The evidence regarding T.V.A. costs was withdrawn precisely to avoid such a charge being made or there being any plausible foundation if made. What petitioners really mean by their statement just quoted is that if anyone should attempt to infer that prices fixed by a conspiracy among competitors are inherently and necessarily unreasonable or unfair by comparison with prices competitively arrived at, such inference is rebuttable. Such an inference is exactly what the Supreme Court in the Socony Oil Case held in effect was not rebuttable under the Sherman Act, because to permit its rebuttal would emasculate and supplant the philosophy of that Act by one which is "wholly alien to a system of free competition." The Court there said that "the fact that, as here, they are fixed at the fair going market price is immaterial" (310 U. S. 223). The Court nevertheless found that there was substantial evidence that "the chief end and objective were the raising and maintenance of Mid-Western prices at higher levels," that this required understanding "to maintain such improvements in Mid-Western prices," and that the conspiracy embraced "at least by clear implication" sales "at the enhanced prices" (p. 253).

"Subject XV. Expert economic testimony"

The implication of petitioners' statements under this subject is that they were deprived of a fair trial and due process by exclusion of the testimony referred to. They divide this excluded evidence into 7 classes, last of which is the trial examiner's refusal to hear additional expert economic witnesses. Since five such witnesses proffered by petitioners had already been heard at great length it was a matter within the sound discretion of the trial examiner whether to hear cumulative testimony of that sort. Moreover, petitioners' other expert economic witnesses had already been permitted to testify over objection on Nos. 1, 2, 3, 4, and 5 of the 7 classes of evidence set forth in this part of petitioners' motion. As to No. 6, "importance of ratio of net profits to actual investment costs as indicating existence of competition," this was properly excluded on the grounds stated by petitioners, namely, that it was "irrelevant and immaterial and on the further ground that there was no definite information in the record concerning

such ratio." (motion p. 62) The reason there was no such information in the record was because it had been excluded as irrelevant and immaterial under the authority of the Supreme Court's opinion in the Socony Oil Case, supra.

The exclusion to which petitioners refer under No. 2 was immediately followed by the same witness being allowed to testify on No. 3, (Tr. 44263, 4, 7, 9-44274) but petitioners do not mention that. Perhaps this was due to the fact that it would not tend to show bias or prejudice on the part of the Trial Examiner but merely inconsistency. As to No. 5, the witness had been permitted without objection to testify that it was consistent with independent competitive action for a mill to oppose diversions and over objection that it was also consistent with such action for mills generally to do so (Tr. 44687-44689). Petitioners do state (motion p. 61) that this exclusion was because "covered by prior testimony." As to No. 1, petitioners fail to mention that the same witness had been permitted to testify on the matter (Tr. 45534, 5) and that it was only when the vagueness of the questions put became apparent that further testimony was excluded. As to No. 3, the objectionably speculative nature of the question is so obvious as to cause speculation as to the reasons for petitioners' including it in building up their contention of bias by the Trial Examiner and lack of fair hearing.

"Subject XVI. Non-rigidity of cement prices"

Petitioners' exhibit 2526 was a tabulation of delivered prices and so could not throw any light upon the rigidity of prices for cement as distinguished from the price of its transportation. It was impossible to determine from it how much of the alleged non-rigidity was the result of changes in cost of delivery by common carrier. But the reasons assigned for exclusion were as stated by petitioners (motion p. 62). However, the exclusion was in conformity with the stipulation referred to and not in conflict with it.

The other excluded evidence purporting to compare the rigidity of cement prices with that of other commodities was obviously rightly excluded because it went to the irrelevant question of the reasonableness of price and would have opened up an interminable inquiry into conditions in other industries. As Judge Major of this Court, said in

U. S. v. *Socony-Vacuum Oil Co.*, 105 F. 2d 809, 833, the trial court has a large discretion in such matters, for "after all, even a conspiracy trial cannot go on forever."

2. Even The Erroneous Exclusion Of Evidence Is Harmless If Its Exclusion Does Not Deny Due Process And Provided The Record Contains Substantial Competent Evidence To Support The Commission's Findings Of Fact.

Under the terms of Section 5(c) of the Federal Trade Commission Act, the party applying for leave to adduce additional evidence "shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission." In *Consolidated Edison Co., et al* v. *National Labor Relations Board*, 95 Fed. 2d 390, the Circuit Court of Appeals for the Second Circuit upheld an order of the Board as adequately supported by the evidence despite the fact that petitioners there were contending that "the Board denied them a full and fair hearing according to due process of law" (p. 394). One ground for such contention was that certain witnesses were not permitted to give what the Court said was "vital testimony" as to petitioners' motive in discharging a certain employee and which refusal the Court characterized as "unreasonable and arbitrary" (p. 397). The Court incidentally pointed out that petitioners had not applied to it for the taking of additional evidence under a provision of the statute which happens to be identical in terms with that in the Federal Trade Commission Act on which petitioners here are basing their motion.

The Supreme Court sustained the lower court in the above case (305 U. S. 197), although agreeing that the refusal to receive the proffered evidence was "unreasonable and arbitrary," characterizing such refusal as "an abuse of discretion" and the excluded evidence itself as "highly important" (p. 226). The decision obviously turned upon the sufficiency of the evidence that was in the record to support the Board's findings of fact. Evidently the Court believed that such refusal, even though in that case an arbitrary and unreasonable abuse of discretion, did not constitute a denial of due process.

It follows that even though petitioners here were assumed to be correct in their contentions that all the evidence covered by their motion had been incorrectly excluded, the validity of the Commission's order would still depend upon the sufficiency of the evidence that was received. This is not to say that if exclusion of evidence amounts to a denial of due process or the right to fair hearing a record that contains in effect only one side of a case will support any order. But short of a situation where the administrative agency has thus denied due process and a fair hearing, the validity of its order turns upon the evidence in the record and not upon even real errors in excluding evidence from the record.

This is merely corollary to the statutory provision that the findings of the Commission, if supported by evidence, shall be "conclusive." Otherwise the appellate court would be called upon, as petitioners here seek to have this Court do, to review each and every alleged error in many thousands of pages and, in effect, to re-try the entire case.

Petitioners refer to the opinion of this Court in *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 Fed. 2d 942, 945, as the ground for their motion (p. 22) when in fact the real ground is to be found in the Consolidated Edison Company case above referred to. In the Consolidated Book Publishers case this Court permitted additional testimony to be taken after the case was argued, "out of abundance of precaution," although "part of the membership of this Court thought that the evidence then in the record was sufficient to support the finding of the Commission to the effect that there was competition and resulting injury." The Court thereupon denied the petition for rehearing and then affirmed its original conclusion that the order was supported by material and competent evidence. It is submitted that the latter case constitutes no precedent or guide for the Court in acting as petitioners wish on the present motion. In fact it recognizes the principle urged herein, namely, that if the record evidence is sufficient to support the findings there is no occasion for taking additional evidence.

3. The Motion Should Be Denied Without Waiting To Consider The Case On The Merits Because The Evidence To Be Adduced Is Obviously Not "Material" Within The Meaning Of The Statute.

Section 5(c) of the Federal Trade Commission Act provides that "if either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission," the court may order such additional evidence to be taken.

The review of the Commission's findings of fact and order on the merits of such a huge record is an immense task for any court but it is one that cannot be avoided where, as here, petitioners challenge the entire proceeding and the record of it. It is important, therefore, that all collateral matters which would unnecessarily complicate and enlarge that task be disposed of in advance so far as feasible. If the court either grants the motion in advance of hearing on the merits or postpones action till the merits are heard, it will have added needlessly and substantially to its labors at a time when it should not be diverted from the merits into a consideration of the mass of minute procedural detail that is embodied in this motion.

Since the petitioners must sometime "show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds" for the failure to adduce it before the Commission, the matter may as well be disposed of now. There is no apparent advantage to anyone in postponing action on the motion till the case is heard on the merits unless or except it be assumed that disposing of the case on the merits will relieve the court of the necessity of disposing of the motion on its merits. If the court indulges petitioners in the unlimited factual review for which they are contending as shown by their petitions and statements of points, then all of the minute procedural details represented by these exclusionary rulings complained of must be reviewed one by one when the court hears the case on the merits. That cannot but detract substantially from the court's attention to the merits.

The sound view is that unless the excluded evidence is such that it would have required the Commission to find

that it outweighs the evidence on which its findings and conclusions rest, it cannot be "material" within the above quoted terms of the statute and it can not be shown to be material "to the satisfaction of the court." That is the essence of the Consolidated Edison Co. case decision of the Supreme Court previously quoted from. In any event the materiality of the excluded evidence can be more precisely appraised now upon the showing made in the pending motion and in this answer with less confusion than when considered in connection with the merits and with the even more numerous alleged prejudicial errors in the reception of evidence that petitioners will later present to the court. To the extent that their motion has merit petitioners themselves would profit by its separate and immediate consideration. To the extent that their motion lacks merit they would profit by postponement and the consequent possibility of confusing it with other issues.

If the motion be viewed as raising the issue of due process and fair hearing as distinguished from merely erroneous rulings, such issue cannot be resolved without consideration of all these separate details which are alleged to add up to the conclusion desired by petitioners. If they are right it would presumably become unnecessary for the Court to decide the case on its merits or to resolve the basic question whether the Commission's findings are supported by substantial and competent evidence and are therefore conclusive under the statute. If petitioners are wrong the sooner both sides are informed to that effect the better, as it would save both sides further fruitless and confusing labor on a collateral matter that is not mentioned in the statute. In neither event immediate disposition of the motion without the possibility of confusing it with the merits would be advantageous to all concerned.

Summary and Conclusion.

It is submitted that neither separately nor collectively can the exclusion of the 16 categories and nearly 300 items of evidence cited by petitioners be inflated into any respectable showing that there was any denial of fair hearing or due process. Not only that but it is submitted that the respective exclusionary rulings attacked were properly made and when examined in their context they demonstrate affirmatively the fairness of the hearings and the absence

of bias on the part of the Trial Examiner. Each and every challenged ruling had a logical legal foundation and falls definitely into one or more of the categories of incompetency, irrelevancy or immateriality, or into that of cumulative proof and other matters within the sound discretion of the trial body. As a matter of fact the record as a whole will demonstrate that the Trial Examiner was more stringent in his rulings against counsel for the Commission than in those against petitioners.

Should the Court be disposed to explore with microscopic thoroughness the exclusion of these 300 items and 16 categories of evidence cited by petitioners, counsel for the Commission have every confidence that no substantial error would be found. They believe, however, that petitioners' claim of denial of fair hearing and due process is only a clever but specious method of attempting to put on the Court the huge and uncalled for burden of retrying the case and reappraising the evidence in minute detail, and to evade or postpone the basic question whether the Commission's findings of fact are supported by substantial competent evidence and are therefore conclusive under the statute. Even aside from the requirements of the limited factual review herein provided by statute, the mere fact that evidence may have been improperly excluded does not constitute reversible error if on the whole record the appellate court believes that substantial justice was done. That is the essence of the Supreme Court's action in the Consolidated Edison Co. case before referred to.

Far from suggesting any lack of full and fair hearing or lack of due process, the record speaks eloquently to the contrary. A strong presumption that they had a full and fair hearing is created by the fact that over 26,000 pages of oral testimony were offered by petitioners and received, over more than a year's time, that over 3000 exhibits were received on their behalf, and that about half of the 22,000 pages of transcript which preceded presentation of their case was non-testimonial matter made necessary by petitioners' objections and arguments thereon.

Counsel for the Commission therefore submit that the Court should hold that petitioners have failed to show "to the satisfaction of the Court" that the excluded evidence was "material." They further urge that the motion should be denied without postponement and without leave to renew it at the time of final hearing. In the event of such

postponement they reserve the right to make such further detailed answer as circumstances may then require.

Respectfully submitted,
Federal Trade Commission,
Respondent.
By: W. T. Kelley,
Chief Counsel.
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.,
June 5, 1944.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cases Nos. 8371, 8386, 8389

Marquette Cement Manufacturing Company,
Superior Portland Cement, Inc.

Northwestern Portland Cement Company,
Petitioners

v.

Federal Trade Commission,
Respondent

Answer In Opposition To Petitioners' Motions To Adduce Additional Evidence

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Filed Jun. 8, 1944. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Marquette Cement Manufacturing Co., Superior Portland Cement, Inc., Northwestern Portland Cement Co., *Petitioners,* vs. Federal Trade Commission, *Respondent.*	Cases Nos. 8371 8386 8389

ANSWER IN OPPOSITION TO PETITIONERS' MOTIONS TO ADDUCE ADDITIONAL EVIDENCE.

Come now counsel for the Federal Trade Commission, respondent herein, and oppose the motions to adduce additional evidence filed by the above designated petitioners and as grounds for such opposition state the following:

Petitioners Superior and Northwestern adopt by reference the motions to adduce additional evidence filed by petitioners in cases 8360, 8361, and 8410 and to that extent their motions are covered by the answers filed in opposition to the motions made therein. They also adopt by reference the motion of petitioner Marquette and reciprocally adopt certain additional paragraphs of each other's motion.

The Attempt To Disqualify The Commission.

The principal matter covered by the motions of these three petitioners and in which no other petitioners have expressly joined is the effort to provide a factual basis in the record for Marquette's special contention that the Commission had disqualified itself from deciding the issues in this proceeding by its alleged prejudgment of them in official reports to Congress and otherwise.

By their motion for leave to adduce evidence in support of such claim of disqualification, these three petitioners have precipitated an issue which it is submitted should not be entertained by the Court at all and which if entertained should be decided against petitioners without waiting for

the case to be presented on the merits. Marquette's Exhibits 1 to 23 inclusive were submitted with the certified transcript of the proceedings on file in this Court, because they are attached to Marquette's motion before the Commission that the Commission recuse itself from passing on the issues in the case. The point of Marquette's present motion is that these exhibits should be ordered by the Court to be received in evidence. Unless the Court were to entertain the theory that it should assume jurisdiction of the wholly collateral question involved and in effect try the Commission for having tried the petitioners, there could be no point in granting the present motion, either now or at any later time.

The grounds for denial of this part of the present motion are largely the same as those stated by the Commission when it denied Marquette's motion to recuse. They are now urged by Commission counsel as reasons for denying at this time the motion that Marquette's Exhibits 1-23 be ordered admitted into the record of evidence or in the alternative that such evidence be ordered taken before the Commission and additional findings made thereon. The stated grounds for the Commission's denial of Marquette's motion to recuse were as follows:

"All the published statements of the Commission which are relied upon by respondent Marquette Cement Manufacturing Company to support its petition and motion to recuse, were made in due course of the Commission's official duties in reporting to Congress and to the President as prescribed by section 6 of the Act creating the Commission. The two principal statements which relate specifically to the nature and degree of price competition in the cement industry were submitted to the United States Senate, printed, and given wide general circulation several years before complaint herein was issued. Such reports were submitted on March 26, 1932, and June 9, 1933.

"Extensive additional investigation was made by the Commission subsequent to publication of the reports last referred to. Thereafter and thereupon the Commission issued its complaint herein on July 2, 1937, alleging, in conformity with its statutory duty, that it then had reason to believe that respondents were maintaining a combination to fix prices in violation of the Federal Trade Commission Act and to discriminate in price in violation of the Robinson-Patman Act. Such formal allegation went

far beyond any of the previously published statements relied upon by respondent Marquette as evidence of bias, prejudice, and prejudgment, but was made in strict compliance with a statutory requirement imposed upon the Commission by Congress. The Commission cannot provide the remedial relief contemplated by section 5 of its organic Act through the procedure prescribed in that section if its advisory reports to Congress, prescribed by section 6 of the same Act, are to disqualify it from proceeding under section 5.

"In said published reports submitted to the United States Senate regarding the cement industry, the Commission did not express itself concerning the unlawfulness of the practices alleged in and by the complaint herein. That is the ultimate issue tendered by the complaint and on determination of that issue disposition of this case depends. In making such reports the Commission specifically reserved for subsequent consideration the question whether the facts disclosed in said reports involved any violation of law. A majority of the present members of the Commission did not take office till after said reports to the Senate had been submitted. Said published statements concerning the nature and degree of price competition in the industry described only a condition of inactive, suspended, or 'imperfect competition' without stating that such condition was caused by any combination such as alleged in the complaint. The same economic concept of 'imperfect competition' was adopted and employed by respondents themselves through the testimony of economists offered by them in this case as an explanation and defense of the identity of delivered price quotations and rigidity of prices, such as were disclosed by said reports and which were confirmed by the evidence received herein.

"Said published statements of the Commission regarding the nature and degree of price competition in the cement industry were well known to respondents, including respondent Marquette, either before formal complaint herein was issued or before testimony was taken in support thereof. Counsel for respondent Marquette participated with counsel for other respondents in the cross-examination of witnesses concerning their collaboration in preparing the reports containing such statements. Respondent Marquette and the other cement producer respondents herein filed answers on the merits to the Com-

mission's complaint and participated actively in contesting the evidence offered in support thereof over a period extending from December 1, 1937, to June 20, 1939. They thereafter offered on their own behalf in opposition to the complaint some 26,000 pages of testimony and some 3,000 exhibits during a period extending from September 5, 1939, to November 29, 1940. Respondent Marquette also during this period offered evidence specially and specifically in its own behalf. The first intimation that the Commission received to the effect that respondent Marquette might challenge its right to hear and determine the case because of alleged bias, prejudice, and prejudgment was contained in the brief of said respondent filed on December 16, 1941, more than a year after the lengthy hearings for the taking of testimony had been concluded. Respondent Marquette did not file its petition and motion to recuse until the day on which it appeared before the Commission through counsel who orally argued its case at length on the merits of testimony taken and offered no argument on his petition and motion to recuse. This was after final oral argument on behalf of the other respondents had been under way for several days without their raising the question covered by the petition and motion to recuse."

Thus, among other reasons, it is submitted that petitioner Marquette and the other two petitioners that have adopted Marquette's motion to adduce this additional evidence had estopped themselves by allowing the complaint to be answered, tried, and briefed over a four-year period before raising such a question, although the facts were within their knowledge.

Petitioner Marquette also moves in this connection that a report by the Commission to Congress in February 1944 be ordered admitted into evidence. This report described the Commission's conclusions and findings which it had issued in this proceeding on July 17, 1943. Even though the Court were to assume jurisdiction of the question of the Commission's alleged disqualification it is obvious that such a report coming so long after the decision of this case would have no probative value.

This attempt to disqualify this Commission from performing its functions as an instrument of the Congress in regulating interstate commerce involves far reaching questions of the proper relation between the legislative and judicial branches of the Federal government.

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1939) the Supreme Court held that the administrative agency there was not bound by the mandate of an appellate court directing that the company's application be considered on the basis of the original record. Pointing out that the mandate was not one from court to court but from a court to an administrative agency, the Supreme Court said:

"What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by the courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution."

The Court further said:

"These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admissibility of proof,' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested

parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

Answering the contention of possible delay and hardship if administrative agencies were permitted the freedom to act as the Communications Commission had acted, the Court said:

"But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K. & T. Ry. Co.* v. *May*, 194 U. S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process."

Petitioners' motion to adduce this particular type of additional evidence is in direct conflict with the principles above quoted. Congress has not only not corrected the alleged evil of which petitioners complain but it has specifically directed and authorized the Commission to make the reports which reflect the alleged bias and prejudgment on which petitioners rely for disqualification. To grant this motion would be to encourage petitioners to further press the Court to entertain jurisdiction of a matter that is outside of and beyond the scope of judicial review provided by the Federal Trade Commission Act. It would lead to a challenge of the power of Congress to combine in one agency remedial relief of a quasi-judicial nature with the function of reporting to Congress on similar matters, after 30 years of judicial acceptance of such a combination of functions.

In *Brinkley* v. *Hassig, et al.*, 83 F. (2d) 351, the Circuit Court of Appeals for the 10th Circuit affirmed a decree of the District Court dismissing a bill to set aside and enjoin an order of the Kansas State Medical Board revoking the license of Brinkley to practice medicine. The principal contention was that the members of the Board were prejudiced and some of them had been active in instigating the complaint. The Court said that "without detailing the evidence, it does appear that some of the board had expressed such prejudice and doubtless all were in fact prejudiced" (356).

The Court stated that it had never been held to be a denial of due process to combine in an administrative tribunal the functions of prosecutor and judge. It said in that connection:

"On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and State Public Service Commissions may prefer complaints be tried before themselves. If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation."

The Court quoted with approval the language of the District Court in which it flatly held that "the members of the board were not disqualified because they knew of his methods prior to the hearing and condemned them. John R. Brinkley's methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation" (357).

The Court nevertheless held:

"Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor who commits an offense so grave that it shocks every right-thinking person, has an irrevocable license to practice his profession if he can get the news of his offense

to the court or board before the trial begins. That will not do. The commendable efforts of the medical and legal professions to raise the standards of their professions by cleaning their own houses cannot be set at naught by any such rule of law.

"From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal."

So here "the only tribunal with power in the premises," namely, to protect the public against unfair methods of competition and price discrimination, is the Federal Trade Commission. Petitioners' motion to adduce this additional evidence is patently a prelude to an attempt to destroy that tribunal so far as this case is concerned and to cripple it in performing the functions assigned to it by Congress.

The Court also held that the mental processes of the Board were immaterial so long as their conclusion was based on substantial evidence, which is exactly the position of counsel for the Commission here. The Court said:

"Findings of administrative tribunals, like verdicts of juries, cannot be overturned by a dissection of the mental processes by which the result is reached, as long as it is reached from a consideration of substantial evidence produced at the hearing. The trial court would have been well within its power if this minute exploration of the mental reactions of the members of the board to particular items of evidence had been drastically curtailed.

"It was not the function of the trial court to retry this case on the merits, and we are not persuaded that the learned trial court did so. Nor is it our function. Whatever may have been the attitude of the trial court is not immaterial, for this is an equity appeal."

This argument, however, is not to be taken as implying even a possibility that prejudice and prejudgment on the part of the Commission may have actually existed. The fact that only these three petitioners are pressing the matter is strong indication that the others have no con-

fidence in it. The fact that oral argument before the Commission was heard to the extent of 11 hours per side is hardly compatible with the prejudice and prejudgment alleged. Counsel for the Commission believe that the evidence underlying the Commission's findings of fact is so powerful that it would have compelled the same conclusion even by a body prejudiced in favor of petitioners. This motion is merely a desperate gamble to escape the force of that evidence. Even though it had merit it is not timely and that alone would bar it under the circumstances recited at pages 5, 6, 7 therein. To that effect see the following authorities:

30 Am. Jur., Judges, Secs. 84, 95;
33 C. J. 1013-1014.

See also *Scott* v. *Beams*, 122 F. 2d 777, 788-789 (C.C.A. 10th, 1941), cert. denied 315 U. S. 809 (1942);
Chafin v. *United States*, 5 F. 2d 592, 594-595 (C.C.A. 4th, 1925), cert. denied 269 U. S. 552 (1925).

Other Matters Covered By The Motions.

Petitioner Marquette also moves to admit certain excluded evidence relating to the practice of prepaying freight. This is a practice that did not come into operation until more than two years after the complaint was issued. The description of the testimony received on this subject as given at page 7 of the affidavit accompanying Marquette's motion, and of which testimony Marquette had the benefit, shows that the exclusion was harmless even if erroneous. It shows further that it was cumulative on a collateral and post-complaint matter. The same contention was made by petitioners in cases 8360, 8361, and 8410 and answered more fully in that connection. We incorporate herein by reference the answer made on this subject in those cases.

Petitioners Superior and Northwestern each complain of the exclusion of certain alleged f.o.b. mill bids submitted after the complaint was issued. We incorporate by reference our answer to the motion made on that subject in Cases 8360, 8361, and 8410. Not only were these admittedly post-complaint bids but they were dated after the direct testimony of the witnesses Taylor and Peoples, some of whose cross-examination had been deferred for the

benefit of Pacific Coast respondents. Yet the bids were offered during this deferred or second cross-examination of those witnesses. The trial examiner specifically ruled that much of what was then being offered through these witnesses could be shown when respondents put in their own case (Tr. 21605, 21818-9). The inconclusiveness of petitioners' claim that these were genuine f.o.b. mill bids is shown by the testimony of the witness Taylor at pages 21626, 21641, 21643, and 21654 of the transcript.

The same two petitioners also complain of rejection of an offer of proof concerning the witness Fry that f.o.b. mill bids had been received by the Interior Department from Western Washington companies "during the entire period" covered by his direct testimony. This was also during the deferred cross-examination accorded the Pacific Coast respondents before the Commission. Mr. Fry was not then on the stand, having been incapacitated by illness after his direct examination and having been excused after cross-examination at that time, which was before the stipulation according any deferred cross was entered into (Tr. 21921, 21923, 21927). The trial examiner specifically ruled that this testimony might be offered later as part of respondents' own case (Tr. 21922, 21928).

Conclusion.

As in the answer to the similar motion filed by petitioners in Cases 8360, 8361, and 8410, it is also here submitted that these procedural details are not properly matters for review by the Court and that neither separately nor collectively do they provide any foundation for a claim of denial of fair trial or due process. In such a claim the petitioners in Cases 8386 and 8389 have expressly joined and petitioner Marquette has sought to reinforce it by this motion. Of course the success of any petitioner on any of such motions would redound to the benefit of all.

For the reasons stated herein and also in the answer to the similar motion filed by petitioners in Cases 8360, 8361, and 8410, the present motion herein should be denied without waiting till the cases are heard on the merits and without leave to renew the same at that time. In the event that action on the motion is so postponed counsel for the

Commission reserve the right to make such further answer as circumstances may then require.

Respectfully submitted,
Federal Trade Commission,
Respondent.
By: W. T. Kelley,
Chief Counsel,
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.
June 5, 1944.

(Filed June 30, 1944, Kenneth J. Carrick, Clerk.)

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

(Captions—8360-8361-8410)

Petitioners' Reply to Answer of Commission in Opposition to Motion for Leave to Adduce Additional Evidence.

Come now counsel for the petitioners herein and make this reply to the Answer of the Federal Trade Commission In Opposition To Petitioners' Motion for Leave to Adduce Additional Evidence:

I. Concessions by the Commission.

1. In order to reduce the issues and simplify the work of the Court petitioners accept the concessions now made in the Answer with respect to portions of Subjects II and XIII and with respect to Subjects III, V and X to the extent hereinafter indicated in the discussion of those subjects and to such extent petitioners will not press their motion.

II. Reply to Commission's Point 2.

(Answers, pages 12-13.)

2. The very fact that petitioners have made this motion distinguishes their case from *Consolidated Edison Co., et al.* v. *National Labor Relations Board*, 95 F. (2d) 390 (C. C. A. 2, 1938), aff'd 305 U. S. 197, 226 (1938), upon

which the Commission relies. In that case it was specifically because the petitioners "did not avail themselves of this appropriate procedure" that the Court was constrained to disregard the "vital" excluded testimony. The Court there held only that the evidence in the record was substantial and supported the Board's findings and not, as inferred by the Commission, that even if the exclusion was incorrect the validity of the findings depended only on the sufficiency of the record evidence. The Commission proceeds on the assumption that the exclusion of petitioners' evidence was not deprivation of procedural due process and misconstrues *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 F. (2d) 942, 945 (C. C. A. 7, 1931), in contending that that case is opposed to the present motion. There, although part of the Court thought the record evidence was sufficient to support the findings, additional supporting evidence was permitted to be adduced. Certainly when additional evidence can be taken to buttress findings which are supported by the record evidence, it can be taken here to support record evidence which shows that the findings are not supported by substantial evidence. There would be no purpose in the statutory provision for this motion if, as contended, it is neither necessary nor practicable for the Court "to review and resolve * * * the conflicting claims * * * regarding the exclusion" (Answer, p. 2, and see pp. 3, 4, 8).

III. Reply to Commission's Point 3.

(Answer, pages 13-14.)

3. The suggestion that the motion should be denied "without waiting to consider the case on the merits" is opposed to the customary procedure of this and other Circuit Courts of Appeals which is to consider the excluded evidence in its relationship to the case as a whole. Recently this Court in *Dietzgen Co., et al.* v. *Federal Trade Commission* (decided Feb. 29, 1944, modified May 3, 1944; reported in CCH court decisions, § 57216, at pp. 57259, 57266) denied a motion to adduce, in the first instance, with leave to renew and then considered and passed upon the motion at the final argument of the petition to review. In *Berkshire Employees Ass'n Etc.* v. *National Labor Relations Board*, 121 F. (2d) 235, 236 (C. C. A. 3, 1941) it

was held that the "wise" procedure is to pass upon the motion at the main hearing "because the problems presented * * * fall into perspective when viewed in the light of the main case." In *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. (2d) 215, 220-222 (C. C. A. 8, 1941) renewal of the motion was permitted when the petition for review was finally submitted and it was then held that there had been deprivation of due process in the exclusion of the evidence sought to be adduced. The Court there emphasized that the Board's charges were not conclusively shown but that the evidence was, as here, "circumstantial." Again in *California Lumbermen's Council* v. *Federal Trade Commission*, 103 F. (2d) 304 (C. C. A. 9, 1939), the Court suggested a motion to adduce as the appropriate relief where the question was one of unfairness in the exclusion of certain matters from the record, saying (p. 305) "its determination requires an examination of the merits of the case that one may know the pertinency of the excluded matter in its relationship to the case as a whole."

4. The principle of the above decisions is particularly applicable in a case of this size where the issues are so many and diverse. In order to determine at this time the questions raised by the motion in their relation to the other and broader issues of the entire case and the evidence now in the record, would require the Court to familiarize itself with the record substantially to the same extent as will be necessary when the case is submitted on the merits. In short the Court would have to duplicate its efforts. The Commission's suggestion jeopardizes the interests of the petitioners in view of the argumentative character of the Answer and its lack of citations which will necessitate a search of the record for facts upon which the Commission's assertions purport to be founded. The Commission recognizes this shortcoming by its reservation of the right to make "such further detailed answer" as the circumstances may require in the event that determination of the motion should be postponed (Answer, p. 16).

IV. Discussion of Particular Subjects.

5. The Commission argues erroneously that petitioners are seeking review by the Court of "each and every alleged error in the exclusion * * * of evidence" (Answer, pp. 4,

13, 15) and "want the Court to weigh" the excluded evidence (Answer, p. 5). On the contrary, the purpose of the motion is to have the Court, in the manner provided by the statute, review the rulings of the Trial Examiner and Commission only with respect to a "typical cross-section" of the volume of excluded evidence so that it may be adduced before and *weighed by the Commission* to enable that body to make proper findings. For the most part the Answer relies expressly on the rulings of the Trial Examiner or, in its argument, merely rephrases such rulings apparently in the belief that once the Trial Examiner has ruled, inadmissability is irrevocably determined (see Answer, Subjects I, III, IV, VI, IX, X, XI, XII, XIII, XV, XVI and Conclusion). The same attitude which characterized the Commission below recurs throughout the Answer. It assumes erroneously that the mere existence of so-called "base prices" and "basing points" *per se* establishes a "combination" and thus precludes evidence by petitioners as to the independent development and application of their methods and practices (Answer, Subjects I, III, IV). It treats petitioners' oral testimony, when adverse to the Commission, as mere "self-serving assertions" while at the same time documentary evidence offered to corroborate such testimony is spurned as "cumulative" (Answers, Subjects I, III, IX, XI). It relies upon the false theory that when evidence has been received on behalf of one or some petitioners in response to or in explanation of evidence on behalf of the Commission the remaining petitioners thereby have obtained a mutual "benefit" which deprives them of the right to introduce their own separate and different responses or explanations (Answer, Subjects I, V, XII).

SUBJECT I.

(Moving Affidavit, page 24.)

Explanations of bids, tabulations of which were received in evidence.

6. The Answer incorrectly describes this evidence as "cumulative testimony" and "no more than self-serving assertions." It is, on the contrary, solely documentary. Although the evidence is distinctly explanatory and petitioners have not as yet succeeded in making it a part of the

record, it is prejudged as confirming the use of "the basing point system as alleged in the complaint," solely because it relates to identical prices.

7. The further statement that "all petitioners were given the benefit of such evidence of this sort as was received" has no bearing since considerations which applied to one petitioner often could not possibly apply to another. Such evidence is the opposite of "cumulative."

SUBJECT II.

(Moving Affidavit, page 26.)

Evidence of f.o.b. mill bids or sales and evidence showing the requests of public purchasing agencies for delivered prices.

8. Petitioners willingly accept the concession that "the Commission never disputed * * * and do not dispute * * * now" the "incontrovertible evidence that public purchasing agencies generally request that they be quoted delivered prices" (Answer, p. 3). This eliminates the need to adduce the evidence described in paragraphs 33 to 35 of petitioners' moving affidavit (at pp. 28-30). Petitioners never suggested as asserted in the Answer (p. 3) that the public agencies in requesting delivered prices "were thereby requesting identical or matched delivered price bids or the use of the basing point system."

9. The extent to which sales are made on the basis of f.o.b. mill bids is important because the Commission has sought to show by circumstantial evidence an agreement to sell only at delivered prices and this evidence squarely meets that of the Commission. The assertion that the statements made in petitioners' moving affidavit are not true is on a par with the characterization of these bids as "keyed" to delivered prices and thus "spurious," as well as the "unequivocal assertion" that the record shows no exclusion of any "genuine" f.o.b. mill bid made prior to the complaint (Answer, p. 3). These are arguments which will be met at the appropriate time. It is sufficient here to point out that petitioners' counsel in offering a large number of these bids (Pet. Ex. 3660) expressly stated that they had been made "without any reference to control clauses, equalization clauses, or destination costs" (Tr. 47688).

Similarly the gratuitous statement that "the directors of The Cement Institute, sitting as The Code Authority, voted to refuse the President's request" for f.o.b. mill bids to Government agencies (Answer, p. 3) is untrue, is without any support in the exhibits cited by the Commission (or any other evidence in the record) and is typical of many similar statements in the Commission's Findings.

Subject III.

(Moving Affidavit, page 30.)

Non-collusion on specific changes in price.

10. The Answer (p. 4) now concedes that "the way these specific changes in price came to their (petitioners') attention" was "through information picked up in the field from their respective customers", whereas the Commission heretofore has contended that petitioners "at times supplemented their basing point system by special understandings and agreements for concerted action to advance * * * prices"[1] and has cited as purported examples of such "understandings and agreements" price advances to which this very evidence relates.[2] Petitioners accept this concession as to all of the advances listed in subdivisions (1) to (8) of this subject (moving affidavit, pp. 30-31) with the exception of the September, 1935 advance which occurred "during the period of * * * NRA Code price filing", although Code price filing had become practically ineffective at that date date. Accordingly petitioners will not press their motion on this subject but their acceptance of this concession is without prejudice to their right to dispute the assertion that such evidence "confirmed * * * that the specific changes in price were pursuant to the operation of the basing point system" (Answer, p. 4).

1. Commission's Brief In Support Of The Complaint, Vol. II, Part II, p. 261.

2. *Idem*, Vol. II, Part II, pp. 270-273.

Subject IV.

(Moving Affidavit, page 32.)

Economic reasons for petitioners' pricing practices.

11. This evidence goes to the roots of the concededly important factor of transportation costs. Petitioners having directly denied through the testimony of their responsible executives the wholly circumstantial claim that they have colluded in the use of destination prices have no alternative other than to demonstrate all the important factors which brought about this long-established practice in the industry. Freight rate maps and scales are obviously basic where the issues revolve around prices which include such rates.

Subject V.

(Moving Affidavit, page 34.)

Independent action on prepayment of freight.

12. The Commission now concedes the "irrelevancy and immateriality" of the subject of prepayment. It concedes further "that information as to this change to a prepayment basis was picked up in the field from customers" and that as "matter occurring long after the complaint" it "could not afford any basis for disposition of the case" (Answer, pp. 4-5). Yet the Findings (par. 12(e)) expressly refer to the practice and contain the damaging inference that it was the result of agreement designed to prevent diversion of shipments. Petitioners accept these concessions and will not press this portion of their motion but insist that the Findings on prepayment should be eliminated entirely from the case and disregarded by the Court.

Subject VI.

(Moving Affidavit, page 36.)

Dealer opposition to and disapproval of trucking.

13. It is not enough that counsel for the Commission conceded at the hearings merely that "some dealers disapproved of trucking" nor that the Findings make passing

reference to their opposition. The purpose of this evidence is to show that such disapproval was true of dealers generally and since they "constitute the most important channel of distribution"[3] that their influence on petitioners' various policies was commensurate.

Subject VII.

(Moving Affidavit, page 37.)

Comparative cost of truck and rail delivery.

14. The question to which this evidence relates is not whether short haul trucking rates were generally lower than rail but whether petitioners acted in combination against trucking and in "monopolizing the benefits of * * * cheaper means of delivery." This evidence shows the extent to which there were no benefits to monopolize. This is just as important as evidence that delivery to buyers' trucks has been consistently available from mills and warehouses of many petitioners at all times, in every section of the country[4] and the evidence of dealers' opposition to trucking (Subject VI), for it is the aggregate of these and other elements which completely overcomes the charge. The asserted distinction between "trucking costs" and "trucking rates" can have no application here because this evidence consists of both a comparison of filed trucking and rail rates and of evidence as to the actual expenses involved in trucking. The mere mention in the Findings (par. 11(b)) of petitioners' testimony as to their reasons for opposing trucking is not in any sense a finding as to the facts. Moreover, the Answer (p. 6) incorrectly implies that delivered prices have been calculated solely on the basis of rail rates. There is abundant evidence that in many areas and at various times during the period in question, such prices have been determined on the basis of trucking and water costs and other existing transportation factors.[5]

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3. Findings of Fact, par. 3(c).

4. See *e.g.*, Tr. 23651, 23727, 46642-46, 30128, 38790, 39642.

5. See *e.g.*, Tr. 8942; Com. Ex. 971-25m-o; Com. Ex. 958-4y; Tr. 33075-77, 47615, 35644, 26084, 36341.

Subject VIII.

(Moving Affidavit, page 38.)

Comparative cost of rail and water delivery.

15. What has been said regarding the comparative cost of truck and rail delivery is equally applicable here. Petitioners have referred to water transportation "which requires rail connections" because, with few exceptions, where water transportation is used, rail connections are needed either from the producer to the water or from the water to the customer. The Commission's comparison of "all-rail" and "all-water" rates ignores the realities of the question (Answer, p. 6).

Subject IX.

(Moving Affidavit, page 39.)

Reasons for Lingeman's resignation and Cree's discharge.

16. The contention that F. R. Johnson, President of Aetna, was permitted "to testify at length" on the very matters sought to be adduced through contemporary documentary evidence (Answer, p. 7) illustrates the consistent practice of the Commission in permitting petitioners' testimony on a given subject while prohibiting its corroboration through documents. Yet the Commission seeks to emphasize the "sharp contrast" between the documentary evidence which it claims supports the findings herein and the merely "oral testimony" of petitioners.[6] Petitioners are entitled to have this evidence adduced so that they too may have the benefit of the greater weight which the Commission accords to documents. It comes with bad grace from the Commission which received in evidence a large number of its own exhibits such as correspondence between third parties where the authors not only were not presented, but were generally unidentified, dead or otherwise unavailable,[7] to argue about the "incompetent form" of petitioners' excluded exhibits such as the letter of Price, Waterhouse & Co. describing Aetna's losses (Pet. Ex. 1831).

6. Commission's Answer to Petitioners' Motion for Simplifying the Record, at p. 2.

7. See Petitioners' Statement of Points, par. 40, and Appendix B, Sections I-VI thereof.

Subject X.

(Moving Affidavit, page 41.)

Railroads as sources of land grant information.

17. Petitioners willingly accept the concession "that the record made by Commission counsel is packed with evidence that the railroads were the principal original source of petitioners' information" concerning land grant rates (Answer, pp. 7-8) and, accordingly, will not press this part of their motion. However, such concession, like the evidence which was sought to be adduced, is entirely inconsistent with the finding (par. 8(h)) that land grant rates "are not available under any circumstances to any of the corporate respondents" and the related findings referred to in petitioners' moving affidavit (par. 54, at p. 41).

Subject XI.

(Moving Affidavit, page 42.)

Reasonableness of shipment distances and cross-hauling.

18. Consistent with its assumption that the mere existence of "base prices" and "basing points" *per se* establishes a combination the Commission now presumes (Answer, p. 8) that allegedly excessive cross-hauling is an effect of the combination. On that basis it would reject as "wholly collateral", indisputable documentary evidence which establishes the limited distances of petitioners' shipments and corroborates petitioners' oral testimony. The analysis of petitioner Nazareth's shipment figures (Pet. Ex. 1421) was prepared under the supervision of the witness (Tr. 27980). The stipulation for the use of such statistics provided that "if otherwise properly admissible" they "may be received in evidence when verified by a witness • • • under whose supervision they were prepared • • •" (Tr. 1613). It is now for the Court to determine whether the Trial Examiner was correct in ruling that the exhibit was not within the stipulation.

Subject XII.

(Moving Affidavit, page 43.)

Independent action on specific changes in market practices.

19. Evidence showing the extent of the differences between the separate petitioners in their sources of information and their reasons for and methods of observance of their respective market practices is fundamental to a determination of whether petitioners acted in combination. Characteristically the Commission has sought to silence such evidence. That the Trial Examiner misinterpreted such non-repetitive evidence as "cumulative" because it showed further differences does not prevent the Court from correcting the error.

Subject XIII.

(Moving Affidavit, page 45.)

Post-complaint matters on which Commission was permitted to introduce evidence and petitioners were not.

20. Subdivisions (2) and (3) of this Subject have been eliminated by the concessions discussed under Subjects II and V respectively.

21. Petitioners have not implied as asserted (Answer, p. 9) that they were not allowed to rebut evidence dealing with specific "instances" of conduct which the Commission claimed showed continuation of "cooperative activity" after the complaint. Rather by the exclusion of this evidence they were not allowed to show through other contrary or inconsistent "instances" that the instances relied on by the Commission did not represent general practices or policies and thus did not justify the finding of continued "cooperative activity." For example, the Commission relied on the lack of response to the Government's indefinite Good Friday f.o.b. mill invitation as proof of alleged continued collusion in "resistance" to f.o.b. mill bids but would not permit evidence as to scores of f.o.b. mill bids which petitioners made to the Government during the same period. Where, as here, the Commission's case is wholly circumstantial it is especially important that petitioners be permittted to prove circumstances directly opposed to those relied on by the Commission. That con-

spiracy may be "by its nature a continuing offense" should not prevent a showing that it did not continue any more than that it did.

Subject XIV.

(Moving Affidavit, page 48.)

Fairness of price.

22. Petitioners would willingly have conceded that this subject was properly out of the case if the Commission had not carried its allegations of "high" and "artificial" prices and "price levels" from the complaint into the Findings and had not left in the record evidence on this subject which it had introduced. The instant case differs from *Socony-Vacuum Oil Co., et al.* v. *U. S.*, 310 U. S. 150 (1940), and *U. S.* v. *Trenton Potteries*, 273 U. S. 392 (1927), where the Court was not dealing with the issue of agreement but only with the question of whether the agreement was in restraint of trade if the prices fixed were reasonable. It is true that in the *Socony-Vacuum Oil Co.* case the allegations in the indictment as to high and arbitrary price levels were considered surplusage but that has not been done here where findings adverse to the petitioners have been made on the subject. Further reasons requiring admission of this evidence which are not touched on by the Commission are set forth in petitioners' moving affidavit (at pp. 48-60).

Subject XV.

(Moving Affidavit, page 60.)

Expert economic testimony.

23. The Commission's response on this subject is in the main no more than a reliance on the Trial Examiner's rulings (Answer, p. 11) with little effort to justify such rulings. The statement that "petitioners' other expert witnesses had already been permitted to testify" on subdivisions (1) to (5) of this subject incorrectly implies that all of said witnesses had so testified. Petitioners' moving affidavit shows on its face (pp. 60-61) that excluded testimony of one or more of such witnesses is sought to be adduced under each of the five subdivisions. That an expert was permitted to testify concerning the harmful effects of uniform f.o.b. mill pricing (subd. (3)) does not

cure the exclusion of his testimony comparing the basing point method of marketing and alternative methods other than uniform f.o.b. mill (subd. (2)), for it was the purpose of the aggregate of such testimony to show that the methods which are in general use today, beyond all others, achieve the best interests of consumer and producer alike. Finally, the record testimony concerning the consistency of independent competitive action and opposition to diversions did not deal with the twenty year time element of the excluded testimony (subd. (5)). The purpose of this was to preclude the possibility of the assertion of any inference of collusion arising out of the long established opposition to the practice.

Subject XVI.

(Moving Affidavit, page 62.)

Non-rigidity of cement prices.

24. The bald assertion that "It was impossible to determine from it (Pet. Ex. 2526) how much of the alleged non-rigidity was the result of changes in cost of delivery by common carrier" (Answer, p. 12) is untrue. Other evidence now in the record together with evidence now sought to be adduced (Subject IV) shows plainly which of the multitudinous price changes were the result of changes in cost of delivery. For example, fifteen of the price changes at Chicago conformed to changes in the Buffington price base (Pet. Ex. 2487), one to the La Salle price base (Com. Ex. 1114) and one to a freight rate change (Com. Ex. 3013-3h [Ex Parte 115-18]). Similarly fourteen of the price changes at Albany conformed to changes in the Hudson price base (Pet. Ex. 2487) and six to freight rate changes (Tr. 38078 [Freight Inc.]; Tr. 33392-93, 33405-06 [Ex Parte 103]; Tr. 33407, 33410-11, Com. Ex. 3029-2r, 3q [Ex Parte 115-18]). This tabulation was prepared under the supervision of the witness (Tr. 35303) and, again, it is for the Court to determine whether it was within the stipulation (described in paragraph 18 hereof).

25. The other tabulation (Pet. Ex. 2527) comparing wholesale prices of cement and other commodities relates only to the Commission's asserted "evidence of rigidity in the record" and the Finding that cement prices "have shown a high degree of rigidity" (Par. 23(e)) and not to the fairness of cement prices.

Conclusion.

Determination of the motion of petitioners should be deferred until the final submission of the case on the merits at which time the motion should be granted.

New York, N. Y., June 28, 1944.

Respectfully submitted,

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8371) * *

RESPONSE OF MARQUETTE CEMENT MANUFACTURING COMPANY TO ANSWER OF FEDERAL TRADE COMMISSION IN OPPOSITION TO MARQUETTE'S MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE.

(Filed June 30, 1944, Kenneth J. Carrick, Clerk.)

Nature of and Reason for Marquette's Motion to Adduce.

Marquette's Motion to Adduce Additional Evidence was merely a technical formality intended to insure the right to present to the reviewing court the evidence which Marquette had presented to the Commission and which the Commission had refused to admit into the evidentiary record.

With the exception of the Commission's report made on its own initiative to Congress in February, 1944, which Marquette desires to present as evidence of the continuation by the Commission of its campaign of denunciation of the alleged pricing methods of the Cement Industry, every item of evidence and every exhibit referred to in Marquette's motion for leave to adduce additional evidence was presented to the Commission but was denied admission into the evidentiary record by the Commission. This rejected evidence consists of the 23 Marquette Exhibits made a part of Marquette's petition to disqualify the Commission for prejudging the charges in the Complaint and for bias and prejudice, and in addition a part of a written offer of proof or stipulation of testimony read into the record. Therefore, all of these items are included in the official record of the proceedings before the Commission, and were certified and filed by the Commission with the Clerk of the Court of Appeals as a part of the record on appeal.

In consideration of the physical facts, it would seem a useless proceeding to ask the Court of Appeals for leave to adduce (present) additional evidence that had already been presented to the Commission and which is actually contained in the certified record of proceedings before the

Commission, presently on file in this Court and therefore available for inspection of the Court for such use of the parties as disposition of the matters on review may require, subject only to an order of this Court that such evidence may be so utilized.

Unfortunately, some conflict of interpretations of certain language of section 5 of the Trade Commission Act, by courts of review other than this Court, has left the matter of procedure in a confused state. The result has been that Governmental Commissions, Boards, or Bureaus have taken advantage of this confusion and have attempted to prevent persons appealing from their orders from securing Court review of excluded evidence offered before such Bureaus.

The language in section 5 of the Trade Commission Act referred to is as follows:

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

As to the proper interpretation or application of the passsage quoted from the Trade Commission Act above, counsel for Marquette adopts the statement of the United States Circuit Court of Appeals for the second judicial circuit in *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F. (2d) 80, 82, July 22, 1940. (On certiorari to the Supreme Court no mention was made in the opinion of that Court which related to the point covered by the quotation below.)

"At the outset a preliminary question arises which we must dispose of before we proceed to the merits. The Commission asks us not to consider the proffered evidence on the ground that the Guild's only remedy was under § 5 of the Act, 15 U. S. C. A. § 45, that is, having failed to 'apply to the court for leave to adduce additional evidence', it lost its only opportunity to question or correct any ruling made during the hearing. This argument rests upon an obvious misunderstanding of the section, and would incidentally result in a procedure that would greatly

hamper, if it did not destroy, the effectiveness of the Commission itself. Section 5 is not directed to the correction of errors committed by the Commission during its proceedings or at any other time; it is analogous to a motion for a new trial upon newly discovered evidence. This appears from its very language, which makes it a condition upon the relief granted that 'there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission.' It is absurd to speak of the exclusion of evidence as a 'failure to adduce' it. Moreover, the notion that every time an examiner erroneously rules out evidence at a hearing, the respondent must apply first to the Commission, and then to the court, to correct his error at the risk of forfeiting all right to complain, scarcely needs to be stated to be answered. It contradicts the whole presupposition on which the statute was drawn; i. e., that the court shall have no jurisdiction over the proceedings until the Commission has concluded the case." (pp. 82-83.)*

The dilemma faced by counsel for Marquette, came about through the language in the opinion of the Supreme Court of the United States in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 226, 228, 83 L. ed. 138 (Oct. 1938), as follows:

"A more serious question grows out of the refusal to receive the testimony of certain witnesses. * * * On July 6th the testimony of Mr. Carlisle and Mr. Dean was taken and the companies also offered the testimony of two other witnesses (then present in the hearing room) in relation to the discharge of the employee with respect to whom the complaint had been amended as above stated. The examiner refused to receive this testimony following a ruling of the Board (made in the course of correspondence with the companies' counsel during the adjournment) to the effect that no other testimony than that of Mr. Carlisle and Mr. Dean would be received on the adjourned day. An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. As-

* See also "Motion to adduce additional evidence as a Prerequisite to review." Pike & Fischer Administrative Law Service, Current Text p. 45 f. 43-1 through 11. Especially the Congressional History of the Trade Commission Act, p. 45 f. 43-4 through 6.

suming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e)(f). Petitioners did not avail themselves of this appropriate procedure." (p. 138.)

Because of the probability that the Trade Commission would raise some such technical objection, counsel for Marquette has complied with all the technical formalities that could be required. Thus Marquette hoped to avoid the Commission using some technical and rather meaningless dodge to avoid the usual consequences of prejudging the issues, and publishing such prejudgement, before it ever made its formal accusation in the Complaint against the Cement Industry.

Nature of the Commission's Answer in Opposition.

The "Answer" filed by the Commission is a strange conglomeration of argument and audacity.

Firstly the Commission contends that the issue of the Commission's bias and prejudice "should not be entertained by the Court at all," and that this is "a matter that is outside of and beyond the scope of judicial review." On this basis the Commission challenges the right of the Court to look at the evidence of the Commission's bias and prejudice.

Secondly, the Commission urges the order and "grounds" of the Commission denying the motion to recuse. The Commission in these "grounds", quoted in the "Answer", interprets the contents of these exhibits. Yet counsel for the Commission argue that these "grounds", based on the contents of the Exhibits, furnish reasons why this Court should not receive the Exhibits into evidence, should not examine them, and should not test the Commission's analysis and interpretation of the Exhibits appearing in these "grounds". This contention is not properly directed to the motion to adduce. The argument goes instead to the subsequent issue which this court will be asked to determine. This issue is the error of the Commission in

denying the motion to recuse, based on the contents of the Exhibits.

At the outset we are told that the matter raised by the petition and consequently the "Attempt to Disqualify the Commission" is "wholly collateral." On the contrary, it is basic—at the very foundation of the case. Even if it did not raise a question as to which writers and lawgivers in the past have been unanimous, "a decent respect of the opinions of mankind," which have ever and everywhere regarded impartiality on the part of those who decide something of the very essence of justice, would preclude waving aside of the petition as merely "collateral."

That a tribunal which had decided the case in advance graciously permitted eleven hours of argument in order to comply with the legal requirement of a hearing does not meet the demand of the law that the hearing be before a tribunal to which arguments may be made with assurance that they will be afforded impartial consideration. A hearing before a tribunal which has decided in advance what the facts are and has expressed that decision in such ways as to make it substantially impossible to recede therefrom and save its face, is not the hearing which the law requires. The tribunal in such a case regards hearings as what Terence Mulvaney described as an "impartinent and shuparfluous nicissity."

The petition is not a "desperate gamble to escape the force of the evidence." It is the assertion of a legal right to escape the force of a preformed and preannounced determination of the facts to be decided. The entire record could at any time have been referred to the Department of Justice and brought before a District Court of the United States with ample power and jurisdiction to issue a restraining order as broad as that issued by the Commission if the evidence justified it. It could still be done if the Commission willingly or as a result of an order of this Court relinquishes the further handling of this matter to the Department of Justice. There never was, and there is not now, any logical or common sense reason why the testimony should be taken over again. On the contrary, if, upon examination of the entire record, the Department of Justice considers there is any case for a restraining order, it would be perfectly simple for the District Attorney to file a complaint based on the facts disclosed in the record in the District Court of the United States. With

no more expenditure of time and energy than would be required to transport the record from the building in which this Court is housed to the Federal Court Building a few blocks away, all the record and exhibits could be made available for consideration of a District Judge of the United States as though the testimony and exhibits had been adduced before a Special Master appointed by the Court.

The Issue Now Before the Court.

The Commission's "Answer in Opposition" asserts that:

"By their motion for leave to adduce evidence in support of such claim of disqualification, these petitioners have precipitated an issue which it is submitted should not be entertained by the Court at all and which if entertained should be decided against petitioners without waiting for the case to be presented on the merits. * * * Unless the Court were to entertain the theory that it should assume jurisdiction of the wholly collateral question involved and in effect try the Commission for having tried the petitioners, there could be no point in granting the present motion, either now or at any latter time." (pp. 1, 2.)

This assertion is equivocal and misleading. What "precipitated", or brought about, the situation of this Court trying the issue of disqualification of the Commission to try the petitioners was the action of the Commission, by its Order of July 17, 1943, refusing to relinquish the trial of the petitioners upon the showing made by Marquette that the Commission had disqualified itself from deciding the issues by its prejudgment of those issues. This was shown both in the Commission's reports to Congress and in other published statements of the Commission, contained in the twenty-three exhibits referred to and made a part of Marquette's petition to disqualify filed with the Commission on May 5, 1942 before the Commission had tried the petitioners.

The jurisdiction of this Court was established by the filing of Marquette's petition to review the Order of the Commission denying Marquette's Motion to Recuse the Commission for prejudging the issues and for bias and prejudice (See pages 7 and 9 of Marquette's Petition to Review filed in this Court on the 6th day of August, 1943) and by the Commission filing in this Court on the 1st day of September, 1943, the record of the proceedings before the Com-

mission, including Marquette's Petition and Motion to Recuse the Commission and the twenty-three Marquette Exhibits. (See Commission's "Answer in Opposition", page 1).

The Commission did not at any time move to quash or strike that part of Marquette's Petition to Review relating to the Motion to Recuse, either before the Commission filed the record in this Court, or at any time thereafter.

The nearest the Commission ever came to any challenge of the jurisdiction of this Court to pass on the question of the Commission's disqualification for bias and prejudice is a rather sarcastic statement made by its attorneys in the Commission's "Statement in Partial and Conditional Opposition to Petitioner's (Marquette's) Motion for Extension of Time and Other Relief".

The circumstances were as follows:

In the affidavit in support of this motion, counsel for Marquette deemed it necessary to give notice that the motions were made without waiving Marquette's right to assign and argue in this Court the error of the Commission in entering the order denying Marquette's petition and motion to recuse and disqualify the Commission and denying the right to offer in evidence the twenty-three publications which contained the statements supporting the petition to disqualify. The affidavit also expressly reserved the right of Marquette by subsequent appropriate proceedings in this Court to secure an early hearing upon the error assigned as to the Order of the Commission denying Marquette's Petition and Motion to Recuse, prior to and separate from any hearing upon the general record. The affidavit contained a brief characterization of Marquette's petition to recuse as follows:

"The petition and motion so denied sought to disqualify the Commission * * * because of bias and prejudice shown by various statements made by the Commission in its official publications and other statements made by members of the Commission in their official capacity as such members, both before and after the filing of the Commission's complaint. Marquette's petition was to the effect that these statements showed that the Commission and the members thereof, before the filing of the complaint, had prejudged and publicly announced said prejudgment of, the acts and practices charged in the complaint, condemning such acts and practices as in restraint of competition

in price, contrary to law, and particularly as in violation of the Sherman Act, and that these statements were repeated in substance at various times after the filing of the complaint and before the Commission considered the evidence in the proceeding before it (See Marquette's petition to review, page 7)."

Thereafter, the Commission filed in this Court its "Statement in Partial and Conditional Opposition to Petitioner's (Marquette) Motion for Extension of Time and Other Relief", and therein set forth:

"In support of its motion, petitioner Marquette submits an affidavit by its counsel. Said affidavit contains a number of statements that are totally irrelevant to the subject matter of said motion and are therefore wholly valueless to the Court in passing upon the merits of said motion. For example, how can it aid the Court in determining how much time Petitioner should have to be informed that Petitioner filed a motion to recuse the Commission on the ground of alleged prejudgment of the issues and that such motion was denied by the Commission?"

"Such matters are not only irrelevant to Petitioner's motion but are irrelevant to the proper scope and nature of the judicial review provided by statute in that they have no bearing upon the question whether the Commission's findings of fact are supported by substantial and competent legal evidence and whether the findings are consequently conclusive. Respondent denies any prejudgment of the issues and asserts that it has acted only in strict accord with the statute that created it and defined its powers and duties. Petitioner Marquette's Petition (Pages 7 and 9) contained two whole sections devoted to its motion to recuse the Commission and in the course of which a number of inaccurate, incomplete and misleading statements are made. *Respondent (Commission) does not wish to burden the Court with such matters, however, unless and until it is determined with some judicial finality that the alleged bias of an administrative agency is properly the subject of judicial review under the statute despite the existence of the agency's findings of fact.*"

Notwithstanding the characteristic flavor of the above quoted statement of the Commission, it had, and still has, no standing as a pleading or a motion to strike. At most it is mere innuendo.

Therefore, there is nothing before this Court now which directly raises the issue of jurisdiction of this Court to

pass upon the question of disqualification of the Commission by reason of its statements showing its prejudgment of the issues in the matter before it, and its bias and prejudice against the Industry and its methods of pricing, which are the subject matter of the Commission's Complaint.

The Commission's Attempts to Suppress Evidence of Prejudgment.

The Commission's "Answer in Opposition" sets forth that:

"The principal matter covered by the motions • • • is the effort to provide a factual basis in the record for Marquette's special contention that the Commission had disqualified itself from deciding the issues in the proceeding by its alleged prejudgment of them in official reports to Congress and otherwise." (p. 1.)

Apparently, the Commission seeks to further suppress the evidence of its published statements which provide the factual basis for its disqualification and thus by indirection defeat the motion to disqualify it. The beauty of such a devious death blow to what the Commission's counsel refer to as "The Attempt to Disqualify the Commission" is that if it were to succeed, it would avoid the embarrassment to the Commission of exposing to the Court and to the Commission's public the real facts showing how far the Commission has gone in its campaign of yillification, condemnation and denúnciation of the Cement Industry. It would thus continue to suppress the factual evidence of its prejudgment of the charges in its Complaint against the Cement Industry which was issued only after the Commission's strenuous, but unsuccessful, efforts to induce the Congress to pass an Act, sponsored by the Commission, which the Commission urged would specifically outlaw the pricing methods in many of the "heavy goods" industries, including the cement industry.

Thus the Commission would continue to suppress the evidence that it issued its Complaint, against the Cement Industry, only after it had certified to the Attorney General alleged facts which it had assembled, and which it asserted showed the unlawfulness of the pricing practices which, in its Complaint, it charged the Cement Industry with using. This was done only after the Attorney General found no case and so reported.

The Commission's crusade was continued by its publication during the taking of testimony before its Trial Examiner in the Cement Case, and thereafter before the Commission considered the evidence, and it is still going on, as will be shown by the report of the Commission made on its own initiative to Congress in February, 1944, which is the only exhibit which Marquette now seeks to have admitted into evidence which is not already a part of the records in this Court.

The entire attempt of the Commission to suppress the evidence, which is relied upon by Marquette to prove the foregoing statements of fact, is of a piece with the action of counsel for the Commission in 1942, when made aware of Marquette's charges of disqualification of the Commission, in requesting Marquette's counsel not to make any mention of the charges in the oral argument before the Commission so as to avoid unpleasant publicity.

It is of a piece with the subsequent conduct of the Commission after counsel for Marquette, as a courtesy to the Commission, complied with the request of the Commission's counsel upon the condition only, that in order to be certain that in so doing he was waiving no right of Marquette, he would ask that the Commission give him assurance in the record, before Marquette's argument was presented, that any motion then filed by Marquette would be considered by the Commission in due course.

In the official report of the subsequent proceedings before the Commission when, after conference with its counsel on the matter above set forth, the Commission assembled to hear the argument of Marquette's counsel, the following appears:

"Before the Federal Trade Commission.

In the Matter of
The Cement Institute, et al. } Docket No. 3167.

Washington, D. C.,
Tuesday, May 5, 1942.

"The above entitled matter came on for oral argument before the Commission at 2 o'clock p. m., pursuant to adjournment.

Present:

Hon. W. A. Ayres, Chairman.
Hon. Garland S. Ferguson, Commissioner.
Hon. R. E. Freer, Commissioner.
Hon. Ewin L. Davis, Commissioner.
Hon. Charles H. March, Commissioner.

"Proceedings.

"Chairman Ayres: The next speaker, I think, is Mr. Zimmerman, recognized for an hour and forty-five minutes.

"I will say, Mr. Zimmerman, any motions you may file at this time will be considered by the Commission at the time the case is considered or submitted."

It is all of a piece with the latest action on the part of the Commission on June 9, 1944, when it filed its "Answer in Opposition", wherein, notwithstanding the obligation of such an agreement covering oral argument, the Commission says in this answer:

"Respondent, Marquette, did not file its petition and motion to recuse until the day on which it appeared before the Commission through counsel who orally argued its case at length on the merits of testimony taken and *offered no argument on his petition and motion to recuse.*" (p. 3.)

The Commission has also not disclosed that on the second day after counsel for Marquette had filed with the Commission its petition and motion to disqualify, supported by the affidavit of counsel above referred to, Marquette's counsel furnished to the Commission "A Memorandum in Support of Petition, Motion and Supporting Affidavit of the Respondent, Marquette * * * to Recuse the

Federal Trade Commission, as Now Constituted, From Passing Upon the Issues in the Above Entitled Cause." This memorandum recited that, for the convenience of the members of the Commission, Marquette presented in the memorandum a list of pages and excerpts from the several publications referred to in Marquette's petition and motion and supporting affidavit, beginning with Exhibit 1 dated June 30, 1927, and running through each subsequent exhibit for each subsequent year to and including 1941.

The Commission, of necessity, admitted the authenticity of the publications referred to as Marquette's Exhibits 1 to 23. The Commission has never denied, as it could not, the statements therein contained which are relied upon, as the Commission says:

"To provide a factual basis in the record for Marquette's special contention that the Commission disqualified itself from deciding the issues in this proceeding by its alleged prejudgment of them, etc." (p. 1.)

Still the Commission seeks by devious means to avoid squarely meeting the issue as to whether or not the Commission did so disqualify itself.

Commission's Claim That Petitioners Failed to Act Promptly Upon Discovery of Evidence of Prejudgment is Contrary to the Record.

A lame excuse offered by the Commission as a reason for excluding evidence relied on to disqualify it, thus escaping the ordinary consequences for prejudgment and bias, appears to be: that this evidence was known to the petitioners either before the Complaint was issued or before testimony was taken in support thereof, and that the petitioners had estopped themselves by allowing the complaint to be answered, tried and briefed before raising the question of disqualification. We are forced to say that this appears to be the contention of the Commission in its "Answer in Opposition" because it is not quite clear whether the Commission's statements are confined to its reports of March 26, 1932, and June 9, 1933, which it refers to on Page 2 of its "Answer" as "the two principal statements". (They were not the two principal statements relied upon by Marquette to disqualify the Commission. The comparative importance of the 23 exhibits will not appear if they are excluded from evidence and from the consideration of this

Court.) The Commission again raises the same question at the top of Page 7 of its "Answer". The Commission's assertions are not valid in law, but, since they are not only entirely unsupported by the record but contrary to the undisputed verified showing in the record, no question of law in the matter of estoppel by delay need be argued. The record is that Marquette's counsel in the affidavit filed in the Office of the Commission with, and in support of, Marquette's petition to disqualify, set forth:

"The information concerning the prejudgment bias and prejudice of the Federal Trade Commission as now constituted did not come to the attention or knowledge of the respondent or its counsel until after the close of the testimony taken before the Examiner in this proceeding. On, to-wit, March 25, 1941, there came to the attention of counsel for respondent, Marquette, Monograph No. 42 above referred to (Marquette's Exhibit 23), and some time thereafter, upon reading said Monograph, counsel for the said respondent for the first time conceived the possibility that the members of the Federal Trade Commission had prejudged every issue of fact and law presented by the complaint and the respondent's answer in this proceeding, whereupon, counsel for said respondent, in the exercise of due diligence, made every effort to obtain and examine all of the various publications made by the Federal Trade Commission wherein any reference was made to any investigation of the portland cement industry. Some of said publications were not available at any library accessible to the counsel for the said respondent and it was not until about the time when the said respondent's brief was due to be filed that it was possible to assemble and examine substantially all of the said publications; the examination of such publications was not completed at the time of filing of respondent Marquette Company's brief in this proceeding, but, nevertheless, counsel for the respondent did in the said brief call attention to the apparent prejudgment of the issues by the Federal Trade Commission (See Pages 1 to 5,* inclusive, of the brief of the respondent,

* This was described by the Commission as the "first *intimation*." Marquette's brief set forth:

"It is respectfully submitted by the respondent Marquette Cement Manufacturing Company that as to the cement industry generally, and particularly as to the respondent Marquette Cement Manufacturing Company, the Federal Trade Commission, before it has considered the recorded evidence the report of the Examiner upon the evidence and

Marquette Cement Manufacturing Company); that thereafter counsel for the said respondent succeeded in obtaining other publications of the Federal Trade Commission wherein reference was made to the investigation of all the action taken against the portland cement industry by the Federal Trade Commission and as the result thereof the matter of the prejudgment, bias and prejudice of the Federal Trade Commission as now constituted is now brought to the attention of the said Commission within a reasonable time after examination of the several documents hereinbefore referred to."

The Commission's Failure to Deny the Statements of Fact Contained in Affidavit in Support of Petition to Disqualify Admits Truth Thereof.

Marquette's counsel, having consented to the request made on behalf of the Commission to avoid disclosure on the contents of the twenty-three Marquette exhibits referred to and made a part of Marquette's motion to disqualify the Commission, and having been assured, of record, by the Commission that the motion to disqualify would be considered when the case was submitted to the Commission, even though not mentioned in oral argument, had a right to expect that the petition, *the attached exhibits,* motion and supporting affidavits filed therewith would at least be given *consideration* by the Commission within a reasonable time.

To facilitate the handling of the matter by the Commission, Marquette's counsel filed the memorandum of excerpts and page references to serve as an index and guide to the Commission in examining the exhibits. Perhaps this was not strictly necessary as an aid to the Commission since the publications were, with a single exception, its own, and the statements were all those of the Commission as a body or its individual members speaking on behalf of the Commission. The Commission and its members are presumed to have been peculiarly familiar

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the briefs and arguments of the parties in this case, has misapprehended and reached erroneous conclusions as to the actual marketing and pricing methods in the industry, and particularly those adopted and used by the respondent Marquette, and that it approaches the final disposition of this case with a prejudiced viewpoint, having prejudged the issues."

with the contents of the exhibits. Certainly, if the Commission found any fault with the form and substance of the petition, motion or affidavit in support thereof, or had any occasion to deny any of the verified allegations of fact therein, it should have acted accordingly and within a reasonable time, at least within sufficient time before it entered its final order, to have enabled Marquette by its counsel to have offered evidence to support any controverted statement of fact.

Thereafter the Commission did nothing in relation to passing upon Marquette's petition to disqualify; no responsive pleading or counteraffidavit was filed, either denying or in any manner traversing anything contained in the petition or the supporting affidavit or citing any authority against it. The Commission simply kept the matter in suppression for fourteen months and then assumed, without more ado, the right to exclude the twenty-three Marquette exhibits from evidence and to deny the petition to disqualify the Commission.

The Commission ignored the affidavit of counsel, and apparently, the memorandum of excerpts from the Marquette Exhibits,—held the Commission should not be disqualified, and topped it all by assuming the power to exclude all of the evidence of prejudgment from the record —and here the Commission asks this Court to continue to suppress that evidence without looking at it.

Marquette respectfully submits the opinion of Circuit Judge Booth in *Nations* v. *U. S.* (C. C. A. 8th) July, 1926, 14 F. (2d) 507, at p. 509. In this case an affidavit of bias and prejudice was filed by the defendant, stating on information and belief, that persons connected with the Government and having special interest in the prosecution had communicated to the Trial Judge what they claimed to be facts and circumstances connected with the charge made in the indictment, as the result of which the Judge had formed and had expressed an opinion that the defendant was guilty. The affidavit was accompanied with a certificate of counsel which was held sufficient under the judicial Code to require transfer of the cause to another Judge. The Court discussed certain alleged deficiencies in the affidavit and then said:

"If it was true that someone connected with plaintiff had made a communication to the Judge, giving what purported to be the facts in regard to the charges in the in-

dictment, and the Judge upon such communication had formed an opinion adverse to defendant, it was not of vital importance who the person was that made the communication, or the time and place of making, and if it was true that the Judge had stated that his opinion was that defendant was guilty of the conspiracy charged in the indictment, it was not of vital importance to whom the statement was made or the time and place of making it.

"Such details, if set out, might betoken verity in the affidavit if it were subject to attack. The affidavit, however, is not subject to attack, but is to be taken as true. And *in any event* the Judge against whom the affidavit is filed cannot pass upon the truth or falsity of it."

The Commission Attempts to Excuse Its Conduct by the Unsupported Assertion That it Was the "Only Tribunal With Power in the Premises." (The Commission's "Answer in Opposition," P. 6.)

"The premises" referred to are the charges made by the Commission in its complaint against Marquette and seventy-four other producers of portland cement. The charge in the complaint is that:

"For more than eight years last past, respondents (the accused cement producers) have maintained and now have in effect a combination among themselves to * * * restrain competition in price, among producing respondents." (The Complaint, Par. Four.)

This charge is nothing more or less than a charge of violation of Section 1 of the Sherman Anti-Trust Act. The Commission assumes, and some decisions have upheld the assumption, and it is not now put in question, that such a violation of the Sherman Act is also an "unfair method of competition" under the provisions of Section 5 of the Trade Commission Act. The selfsame charge of combination is by reference made a part of Count 11 of the Complaint which is entitled, "The Charge Under the Clayton Act." This Count adds the charge of discrimination in price.

The Commission has, as is shown in some of the Marquette Exhibits, frankly stated that the Department of Justice has concurrent power or jurisdiction with the Trade Commission to enforce or secure the restraint of the

Anti-Trust Acts—the Sherman Act and the Clayton Act. Section 4 of the Sherman Anti-Trust Act, as printed in the booklet issued by the Federal Trade Commission entitled, "Rules, Policy, and Acts" purporting to list the acts over which it exercises jurisdiction, provides:

"Sec. 4. Enforcement. (26 Stat. 209; 15 U. S. C. A., Sec. 4.)

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *"

Section 15 of the Clayton Act from the same booklet provides:

"Sec. 15. Jurisdiction of United States District Courts to Prevent and Restrain Violations of This Act. (38 Stat. 736; U. S. C. A., Sec. 25.)

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *"

As stated by the Circuit Court of Appeals in *Brinkley* v. *Hassig*, cited by the Commission, "If another tribunal exists to which resort may be had, a disqualified member may not act." (p. 357.)

Since there has always existed a proper tribunal wherein the fair and impartial trial guaranteed by the Constitution could be afforded petitioner and the other members of the Cement Industry, namely, the District Courts of this country, the Commission cannot hide behind a claim that it is the "only tribunal" to prosecute or try its charges against the cement industry.

The remarks of the Court in *State* v. *Aldridge*, 103 So. (Ala.) 835, (1925) in response to a claim similar to that

urged by the Commission, are peculiarly appropriate to the moot question raised by the Commission.

"(6) The policy of the rule of disqualification is of paramount importance, and if it is to yield in any case it is only when there exists therefor a very great necessity to prevent a failure of justice. Such a situation is not, in our opinion, here presented. To the appellant a fair and impartial hearing of the petition for cancellation of his certificate is shown to be of very great importance. Upon it hinges the deprivation, *vel non*, of a valuable property right, and some of the charges involve matters of personal reflection upon his character.

"From the delay there will therefore be no denial of justice. Clearly no great necessity is shown for a speedy determination. The omission may readily be remedied by the Legislature. It has been suggested by counsel for appellant, with some force, that, if a speedy trial is of so great importance, the present members may remedy the situation by resigning that others not disqualified may hear the cause, especially in view of the fact that the position is not a salaried one. Indeed, this suggestion was given favorable consideration by the Iowa court in *Stahl* v. *Board*, 187 Iowa, 1342, 175 N. W. 772, 11 A. L. R." p. 838.)

Despite the fact that the Commission has never, by any proper means, challenged the jurisdiction of this Court to pass on the question of disqualification of the Commission for prejudging the issues and for general bias and prejudice relating to the defendants named in the Commission's Complaint and the charges made against them by the Commission therein, the Commission attempts by other statements not heretofore cited, to weave this issue into its "Answer in Opposition" to Marquette's Motion to present the excluded evidence to this Court. For example the Commission says in its "Conclusion":

"These procedural details are not properly matters for review by the Court and neither separately nor collectively do they provide any foundation for a claim of denial of fair trial or due process."

In such a cavalier manner the Commission seeks to belittle and dispose of an age-old, basic law that bias or prejudice against an accused or his cause—or personal interest of a Judge concerning the matter to be tried before him—disqualifies him to sit in judgment in that case.

This is not the time to argue that matter at length, but we will be pardoned, we believe, for imposing upon the time of the Court to respectfully suggest that the principle is easily traceable to Magna Carta in the English law, to the Code of Justinian in the Roman or Civil law, to unknown antiquity in the laws of the Church, and, as a fundamental principle of fair play among mankind it must, indeed, have had its birth in the dawn of civilization. It is of the very essence of the common law older than our State Constitutions or the "Bill of Rights" in our Federal Constitution. It has, in some of its applications, been specifically mentioned in Constitutions; for example, the Constitution of the State of Illinois:

"but no judge shall sit in review upon cases decided by him." (Article 6, § 11.)

It is universally recognized and voluntarily self-applied by our American Judiciary in cases too numerous to list. Examples of such self-disqualification by members of the Supreme Court of the United States account for many decisions by less than a full number of the Justices of that Court.

So well settled is it that when the Congress intended to bring about even a slight deviation from this "unalienable" right, it provided in the "National Labor Board Act" that:

"The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case."

Let it be noted that deviation, if such there be, from the strict application of the old rule by no means constitutes an attempt to grant general immunity from the ancient rule of disqualification. This is clearly attested by an opinion of this Court in a Labor Board case decided June 15, 1942 in which this Court said:

"Notwithstanding the very limited and minor role which the courts are permitted to play, in the enforcement of the National Labor Relations Act, any charge which assails the integrity—the fairness—of the official conducting the hearing, not only touches the court in a sensitive spot, but must be remedied, if the charge be true and if our authority is not trimmed to a point of innocuous harmlessness." (pp. 480-481.)

"Whether the evidence established unfairness or bias so as to require a new trial or a holding that the examiner in this case was biased and prejudiced, is a question we must decide." (p. 480.) *N. L. R. B.* v. *Acme-Evans Co.*, 130 F. 2d 447, (C. C. A. 7).

Section 6 of Trade Commission Act Does Not Excuse Prejudgment.

The Commission in its "Answer in Opposition", asserts a claim of privilege under Section 6 of the Trade Commission Act. The Commission says:

"All the published statements of the Commission which are relied upon by—Marquette * * * to support its Petition and motion to recuse, were made in due course of the Commission's official duties in reporting to Congress and to the President as prescribed by Section 6 of the Act creating the Commission." (p. 2.)

This is an inaccurate statement and it is therefore denied and disputed by Marquette both as to the facts alleged and the conclusion of law involved. Only by a careful consideration of the pertinent parts of the excluded Marquette Exhibits 1 to 23 inclusive can the disputed facts be settled.

The Commission also asserts on the same page

"The Commission cannot provide the remedial relief contemplated by Section 5 of its Organic Act through the procedure prescribed in that Section if its advisory reports to Congress, prescribed by Section 6 of the same Act, are to disqualify it from proceeding under Section 5."

Even though the Commission, on its own interpretation of Section 6 of the Trade Commission Act, may have been authorized to make the statements, this could not render the Commission immune from disqualification for bias and prejudice. Had it been the intention of the Congress that this should be so, this intention could easily have been included in the Act. Whether or not such an Act of the Congress would violate the fundamental law hereinbefore first stated or be declared unconstitutional because of the "due process" provision of the Fifth Amendment to the Constitution of the United States is a moot question. The fact remains that the Trade Commission Act does not so provide. It is plain that the Congress understood that such immunity could not be inferred, but if it is so meant to be allowed, it must be included in the Act itself. This is illus-

trated in the language used by the Congress in the National Labor Relations Board Act which is quoted above.

In the absence of any similar provision in the Act creating the Trade Commission, it cannot even presume to avoid the consequences of bias and prejudice by taking refuge behind Section 6 of the Trade Commission Act. Nor will it do to say that to enforce the general and long settled rule upon administrative agencies will destroy their investigatory function. It is quite possible (a) to conduct an investigation as a hearing, or (b) to make the result of even a one-sided investigation a basis of a suit for a restraining order in the courts.

"Administrative Agencies" Not Exempt From Rules of Fairness Applied to Ordinary Courts.

The law is so well settled as to the strict application of the ancient rule of fair play to "Administrative Agencies" that also function in judicial capacities that we shall now cite a very few of the leading cases only by way of illustration.

Berkshire Employees Association, etc. v. *National Labor Relations Board*, 121 F. (2d) 235 (C. C. A. 3), June 19, 1941 (opinion by Judge Goodrich):

"Nevertheless, if the administration of public affairs by administrative tribunals is to find its place within the present framework of our government, it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal." • • • "In this case Mr. Smith's correspondence bears the possibility of interpretation that he was endeavoring to assist in a boycott on Berkshire's goods. This was at a time before he was called upon, in his capacity as a Board member, to pass upon the questions concerning unfair labor practices by Berkshire. It goes far beyond a general predilection either for or against labor organizations in general or one organization in particular. It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled is appointed to the bench and sits in the very case as judge."

• • • • •

"If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side."

N. L. R. B. v. *Jones and Laughlin Steel Co.*, 301 U. S. 1, 47, 81 L. ed. 893, 917:

"* * * Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. * * *"

N. L. R. B. v. *Cherry Cotton Mills*, 98 F. 2d 444, C. C. A. 5 (1938).

Morgan v. *United States*, 304 U. S. 15, 16; 82 L. ed. 1129, 1131, 1132, 1133, 1134, 1135:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (p. 1134.)

Commission's Knockout of Strawmen Clouds Real Issue.

The Commission in its "Answer in Opposition" sets up straw men and knocks them down, raises and disposes of false issue and, in general, attempt to becloud the situation. For example, the Commission talks about "this attempt to disqualify this Commission from performing its functions as an instrument of the Congress in regulating interstate commerce." (Botton of Page 3.) If the Congress has knowingly delegated to the Commission any of its legislative powers, or if the Commission has, under the lately popular theory of "acquiescence by Congress", usurped some powers of legislation to regulate interstate commerce, that is not at the moment any concern of the petitioner, Marquette. Nor has it any bearing upon the issue of whether or not the twenty-three Marquette Exhibits should be presented to and considered by this Court in connection with Marquette's petition to review the order of the Commission refusing to disqualify its members be-

cause of their published prejudgment of the charges made by the Commission against the Cement Industry. *It is the judicial functions exercised by the Commission with which the case at bar is concerned.* If we go beyond the scope of judicial functions at all, it is only to the extent of the disqualification of the Commission to act as a judicial tribunal because of over-zealousness of the Commission in exercising its propaganda functions.

Another straw man which the Commission sets up and forcefully knocks down is disclosed by the following quotation from the Commission's "Answer in Opposition", wherein the Commission says:

> "To grant this motion (to present in evidence Marquette's twenty-three exhibits) would be to encourage petitioners to further press the Court to entertain jurisdiction of a matter that is outside of and beyond the scope of judicial review provided by the Federal Trade Commission Act. It would lead to a challenge of the power of Congress to combine in one agency remedial relief of a quasi-judicial nature with the function of reporting to Congress on similar matters, after 30 years of judicial acceptance of such a combination of functions."*

What is meant by the expression of "remedial relief of a *quasi-judicial* nature" is a mystery. Counsel for Marquette respectfully suggests that such a term is not properly applicable to any judicial process.

Perhaps the best attempted translation of the word "quasi" as used by lawyers is "not exactly". See Report of Committee on Minister's Powers presented by the Lord High Chancellor to the English Parliament April 1932,

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* Perhaps such a challenge would have been timely in 1932 when the Honorable James M. Beck, Senator, Member of Congress and former Solicitor General of the United States published that worth while but too little read book entitled "Our Wonderland of Bureaucracy," in which he included a chapter entitled "Bureaucracy as Prosecutor, Jury and Judge." The behavior pattern of such a Bureau or Commission, the author, in his introduction, well describes as follows:

> "If the King in the Caroll classic believed in finding a verdict first and then trying the accused afterward, he merely imitates the Federal Trade Commission, which after much costly investigation into some business enterprises and after reaching a conclusion as to the guilt of some unfortunate business man, then proceeds to formulate its own charges and tries the same as prosecutor, judge, jury and Lord High Executioner."

Since 1932 too much bottom-mud has been stirred up in the stream. When the water settles a little more perhaps the mistake of creating a Janus-faced body may loom clear enough to call for correction. Mere age is no guarantee of virtue.

Page 73. This was a report on the usurpation of powers as to safeguards deemed necessary to secure the constitutional principles of sovereignty of Parliament and the supremacy of the law as against the encroachments of Bureaus in England which are modeled after the European continental system. It was brought about by the publication of Lord Hewart's book on this subject entitled "The New Despotism". Therein it said:

"A 'quasi-judicial decision' is thus one which has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term 'quasi-judicial decision', as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded.

"A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:—

"(1) the presentaiton (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

It has been even better stated in an American Court:

People v. *Trustees*, 4 App. Div. (N. Y.) 399.

"But it is said the board of trustees did not constitute a court, and that Thurber was not acting as a judge.

Blackstone defined a court as consisting of at least three constituent parts, namely: 'The *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it, and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by its officers to apply the remedy.' (3 Black. Com. 25.)

In the proceedings now under review, we have the three constituent parts of a court as Blackstone defined them: The actor, Thurber, who complains of an injury done to the public; the defendant, the relator, and the judicial power to ascertain the truth of the charges, the board of trustees.

Witnesses were sworn, their evidence taken and arguments heard, and the board passed upon the effect of that evidence.

'To administer oaths, to hear evidence, to weigh its effect, to compare it with the law and to decide the questions presented, are of the essence of judicial action.' (*Barhyte* v. *Shepherd*, 35 N. Y. 238-251).

The action the board was taking was judicial and for the purpose of examining the charges against the relator it was a court, and Thurber was one of the judges composing it.

It is a general and sound principle that, whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, * * * the person thus clothed with power is invested with discretion, and is *quoad hoc*, a judge.' (*Vanderheyden* v. *Young*, 11 Johns. 150-158)." (pp. 404-5.)

In order to knock down the straw men which it sets up the Commission cites the *Dr. Brinkley Case* and says:

"The Court stated that it had never been held to be a denial of due process to combine in an administrative tribunal the functions of prosecutor and judge."

No such point is involved in the case at Bar. It was not raised by Marquette. The point of Marquette's complaint against the Commission is that it has not only combined the functions of Grand Jury, Prosecutor, Judge, Jury and "Lord High Everything Else", but before it began to exercise all those several functions, it had prejudged the charges which it later put in its complaint against the Cement Industry and, in numerous official publications put out by the Commission and otherwise, it had published this prejudgment and other strong expressions showing its bias and prejudice against the Industry and the pricing practices which the Commission *charged* the Industry with using.

Cases Cited by Commission Not in Point.

The *Pottsville Broadcasting Company Case* cited by the Commission in its "Answer in Opposition" (Page 4) has no bearing upon the question of admissibility of evidence showing prejudgment and bias of the Commission. No such point was involved in the case. None of the cases or text book references by the Commission are in point.

Conclusion.

There are many important cases in addition to the few herein cited which are in point in the matter of jurisdiction of this Court. They are also in point as to the nature and extent of the relief to be granted by the Court of Appeals in review of the Commission's erroneous orders. However it does not seem proper that these points should be here further argued at length when all that is presently before this Court is Marquette's Motion for Leave to Adduce Additional Evidence and the Commission's "Answer in Opposition". We have now complied with all the preliminary technicalities. The evidence showing the nature and extent of the Commission's prejudgment, bias and prejudice being now physically in this Court we respectfully submit we should get at the essential matter of disposing of Marquette's Petition To Review the Order of the Commission Denying Marquette's Petition and Motion To Recuse.

Disposition of This Matter Should Be Separately Set and Presently Heard.

All other questions in the case (that may arise from the general record) are subordinate. The ruling of this Court upon the order of the Commissioners refusing to disqualify themselves for bias and prejudice should terminate at the threshold all further consideration of the enormous record of approximately one hundred thousand pages brought from the Commission to this Court for review. Orderly procedure, economy of the Court's time, conservation of essential manpower and materials and the avoidance of unnecessary expenditure of upwards of one hundred thousand dollars for printing portions of the record, are strong reasons for disposing of this matter separately and at as early a time as the convenience of the Court will allow.

Evidence Relating to the Charges in the Complaint and Other Errors in the Trial Before the Commission Are Not Involved.

Determination of this matter to be presented to the Court will not involve any questions of evidence, or of trial procedure, arising under the compendiums of Points filed, in this Court, with the twelve separate petitions to review the "Order to Cease and Desist." It will not require printing of thousands of pages of designated portions of the forty-

nine thousand page record of oral testimony,—or of any part of it. It will not require examination of any of the exhibits received in evidence. Only the exhibits attached to Marquette's Motion to Recuse and one new one will be involved.

The Commission has in the beginning of its "Answer in Opposition" on Page 1 and again in its "Conclusion" on Page 8, said:

> "The present motion herein should be denied without waiting until the cases are heard on the merits and without leave to renew the same at that time."

Marquette hastens to agree that the matter should be promptly heard by the Court prior to and separate from any proceedings upon the merits. All procedural matters relating to the merits should, in the meantime, be suspended until this controlling phase of the case is heard and disposed of. This is of especial importance since the Commission under its title "Conclusion" on Page 8 of its "Answer in Opposition" says:

> "The success of any petitioner on any of such motions would redound to the benefit of all."

Motion.

We respectfully petition and move that:

(a) this Court enter an order setting down for hearing that portion of Marquette's Petition to Review praying this Court to review and set aside the order of the Commission denying the petition and motion of Marquette to recuse the Trade Commission;

(b) that in connection with the said order setting the matter for hearing, the court fix a time within which Marquette shall file its brief and memorandum in support of this portion of its Petition to Review, the time within which counsel for the Commission shall file its answering brief, and the time within which the attorneys for Marquette may file a response thereto;

(c) and that oral argument be permitted at the hearing of the petition to review the said Order of the Commission.

Respectfully submitted,

Edward A. Zimmerman,
H. W. Norman,
W. R. Engelhardt,
Attorneys for Petitioner, Marquette Cement Manufacturing Company.

Roscoe Pound,
Of Counsel.

United States of America,
State of Illinois,
County of Cook. } ss.

Verification.

Edward A. Zimmerman, being first duly sworn, deposes and states that he is the attorney of record for Marquette Cement Manufacturing Company, petitioner, in the present proceedings for review of the orders of the Federal Trade Commission, and was attorney of record for petitioner during all of the proceedings before the Federal Trade Commission; that he has read and knows the contents of the foregoing "Response of Marquette Cement Manufacturing Company to Answer of Federal Trade Commission in Opposition to Marquette's Motion for Leave to Adduce Additional Evidence and Motion to Set for Hearing Petition to Review and Set Aside Order Denying Petition and Motion to Recuse the Federal Trade Commission and For Other Relief," and that the statements of fact contained therein are true.

Edward A. Zimmerman.

Subscribed and sworn to before me this 29th day of June, 1944.

Elizabeth-Anne Richards,
Notary Public.

(Seal)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 8371.

Marquette Cement Manufacturing Company,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

REPLY OF RESPONDENT TO RESPONSE OF PETITIONER MARQUETTE TO ANSWER OF FEDERAL TRADE COMMISSION IN OPPOSITION TO PETITIONER'S MOTION TO ADDUCE ADDITIONAL EVIDENCE.

Come now counsel for respondent Federal Trade Commission and by leave of Court first obtained make this reply to certain misstatements of fact appearing in petitioner's response above referred to:

At pages 13-14 of petitioner's response the statement is made that "the entire attempt of the Commission to suppress the evidence" of its alleged bias and prejudgment "is of a piece with the action of counsel for the Commission in 1942, when made aware of Marquette's charges of disqualification of the Commission, *in requesting Marquette's counsel not to make any mention of the charges in the oral argument before the Commission so as to avoid unpleasant publicity.*" (Emphasis added)

Counsel for the Commission emphatically and categorically deny that any such request was ever made by them of Marquette's counsel, either expressly or by implication. It would have been absurd to think that any "unpleasant publicity." could result from having the Commission's attention orally directed to the contents of the Commission's own official published reports, each of which had received wide publicity at the time of issuance.

Petitioner's counsel goes on to state that he "as a courtesy to the Commission, *complied with the request of the*

Commission's counsel upon the condition only, that in order to be certain that in so doing he was waiving no right of Marquette, he would ask that the Commission give him assurance in the record, before Marquette's argument was presented, that any motion then filed by Marquette would be considered by the Commission in due course." (Emphasis added)

Counsel for the Commission repeat that there was no such request by them, consequently no compliance therewith on any condition such as above stated by petitioner's counsel. The assurance of consideration which the record shows to have been given was not given in return for an understanding with counsel that he would not argue orally the merits of his motion to recuse.

Petitioner's counsel then complains (page 15) that "notwithstanding the obligation of such an agreement covering oral argument" reference was made in our answer of June 9, 1944 to the fact that he "offered no argument on his petition and motion to recuse."

Counsel for the Commission again state that there was no such agreement and further state that there was no proposal or discussion of such an agreement. It would have been absurd for Commission's counsel to be concerned about oral argument on official publications of the Commission that had already received the widest possible publicity.

On page 18 of petitioner's response reference is made to "Marquette's counsel, *having consented to the request made on behalf of the Commission to avoid disclosure* on the contents of the 23 Marquette exhibits referred to and made a part of Marquette's motion to disqualify the Commission." (Emphasis added.)

Counsel for the Commission again categorically deny that any such request was made. The thought is ridiculous that they could have been interested in avoiding disclosure in oral argument of the contents of the officially published reports of the Commission on which petitioner relies as evidence of alleged bias and prejudgment.

Petitioner's counsel goes on immediately to say (page 19) that he was "assured, of record, by the Commission that the motion to disqualify would be considered when the case was submitted to the Commission, *even though not mentioned in oral argument.*" (Emphasis added) In this

way counsel repeats by innuendo the false idea that the assurance given of record was in consideration of his omitting the matter from his oral argument.

Thus, in five separate instances petitioner's counsel has flatly misstated the facts in his attempt to account for his failure to argue orally before the Commission the matter of his petition and motion to recuse. Incidentally, it may be noted that petitioner's counsel is reported by the Chicago Journal of Commerce of June 16 and the Journal of Commerce of New York City of June 21 to have made for publication similar misstatements concerning the alleged request of Commission's counsel that the matter be omitted from the oral argument before the Commission. Photostatic copies of such articles are attached hereto.

Counsel for petitioner also distorts the facts by saying (p. 13) that the Commission certified to the Attorney General alleged facts which it had assembled and which it asserted showed the unlawfulness of the cement industry's pricing practices and that the Attorney General found and reported to the Commission there was no case. No such certification to or report by the Attorney General was ever made regarding the Cement industry.

Petitioner's counsel misrepresents (p. 24) the position of counsel for the Commission by arguing that we consider the matter of the alleged disqualification merely as one of "these procedural details". That quoted language from our answer (p. 8) clearly applied only to the "other matters" covered by petitioner's motion to adduce and by the motions of other petitioners in Cases 8360, 8361, and 8410. This is demonstrated by the fact that our answer stated that this petitioner had sought to reinforce the other petitioners' claim of lack of due process based on "these procedural details" by filing its motion looking toward disqualification.

Counsel for petitioner states (p. 17) that the Commission's assertions quoted on page 3 of our answer concerning the untimeliness of petitioner's motion to recuse "are not only entirely unsupported by the record but contrary to the undisputed verified showing in the record." The assertions referred to are the Commission's own official statements made in connection with its denial of petitioner's motion to recuse. They are fully supported by the record as will appear if and when the matter is briefed. As

for their being contrary to the undisputed *verified* showing in the record, counsel for the Commission rely upon Rule 11 of the Rules of Civil Procedure which rests on the theory that formal verification of pleadings by an attorney adds nothing to the signature thereto of the same attorney.

Counsel for the Commission repel any suggestion or insinuation by petitioner's counsel that the Commission is reluctant to meet any relevant and properly raised issue concerning its alleged disqualification to hear and decide this case. They welcome the opportunity to meet any such issue at any time the Court may see fit. They insist that the only question here involved is whether the Commission's statutory functions of investigating for and reporting to Congress or to the President and of instituting, hearing, and deciding a remedial proceeding such as the present case can be combined in and exercised by one administrative agency without denial of due processs. They repeat, however, their contention that if the Court concludes that the Commission's findings of fact are supported by substantial competent evidence, such findings are conclusive without regard to such alleged prejudgment as is here relied upon by petitioner.

Respectfully submitted,

Federal Trade Commission,
Respondent,

By: W. T. Kelley,
Chief Counsel,
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.,
July 7, 1944.

Journal of Commerce
Chicago, Ill.

Date Jun 16 1944

Business Denied
Fair Play by FTC,
Lawyer Charges

Charging the Federal Trade Commission has assumed complete power to rule business, in excess of its authority, E. A. Zimmerman, of the Chicago law firm of Zimmerman and Norman, assailed the commission for seeking "to deprive the American business man of the last protection of the law of fair play."

Zimmerman and Norman represents the Marquette Cement Manufacturing Company, one of the companies in the cement industry which has been sued by the FTC under the Sherman antitrust act on charges of price fixing in restraint of trade. The case is pending in the United States court of appeals here.

Mr. Zimmerman detailed the background of the case, recalling that in 1937 the FTC started proceedings against the industry, including the Cement Institute and 75 cement manufacturers of the country, for the "alleged use of a so-called system of pricing. It was charged that under this system the defendants maintained a combination in restraint of competition in price."

Mr. Zimmerman said that his client, Marquette Cement, had filed with the FTC a petition to disqualify it for "prejudgment of the issues and for bias and prejudice against the industry." The company offered 23 exhibits in evidence.

Then, Mr. Zimmerman said, when the FTC issued its restraining order against the entire industry, it refused to admit Marquette's exhibits and denied the petition to disqualify the commission, even though counsel for the FTC had earlier asked the company counsel to withhold mention of its charges in oral argument.

Journal of Commerce
New York City

Date Jun 21 1944

Bias Charged Against FTC in Cement Case
Held Grounds for Its Disqualification

(Special to Journal of Commerce).

Chicago, June 20.—The Federal Trade Commission has disqualified itself to sit in judgment on the basing point system used by the cement industry, and has sought to set itself above the courts and above the Department of Justice in attempting to rule arbitrarily the destiny of all business in the United States, according to a statement issued by Edward A. Zimmerman of Zimmerman & Norman attorneys for the Marquette Cement Manufacturing Co.

The commission prejudged the issues long before it issued its complaint against the cement industry's use of the basing point system, Mr. Zimmerman said. On June 9, he said, the commission filed an answer with the United States Court of Appeals in Chicago in which the commission sought to prevent the Marquette Cement Manufacturing Co. from presenting evidence to prove that the commission had disqualified itself because of bias and prejudice.

History of Case

The statement issued by Mr. Zimmerman points out that the commission began proceedings against the cement industry in 1937, charging that the basing point system was in violation of the Sherman Anti-trust Act and that its basing point prices were discriminatory and in violation of the Robinson-Patman Amendment of the Clayton Act. Marquette subsequently offered in evidence twenty-three exhibits consisting of pamphlets and press releases issued by FTC from 1927 to 1941, to prove its charge that the commission had disqualified itself through its bias and prejudice against the industry.

"Counsel for the commission, in 1941, when made aware of the charges of disqualification, requested Marquette's counsel not to make any mention of the charges in the oral argument before the commission, so as to avoid un-

pleasant publicity." Mr. Zimmerman said. "Marquette's counsel agreed as a matter of courtesy.

"The commission took Marquette's motion and the exhibits and held the whole matter in suppression for fourteen months, and then, at the time it issued its restraining order, in 1943, against the cement industry, refused to admit Marquette's exhibits in evidence and denied the petition to disqualify the commission for bias and prejudice.

Appeal by Marquette

"Now Marquette, joined by certain other cement manufacturers, having filed an appeal proceeding in the United States Circuit Court of Appeals for the Seventh Circuit to review the orders of the commission, presented a motion before the court to admit the Marquette exhibits in evidence. The commission has opposed this motion, asserting that the examination and review by the court of Marquette's exhibits 'should not be entertained by the court at all'; that this is a matter 'that is outside of and beyond the scope of judicial review.'

"In asking the Court of Appeals for permission to put into evidence the exhibits containing the factual basis of the charge of bias and prejudice of the commission, the question before the court was in substance whether any bureau, commission, or so-called 'administrative agency' can conduct a smear campaign against a business or an industry, charge it publicly with violation of law, and thereafter, having reached and published a conclusion as to guilt of the unfortunate accused, proceed to formulate its own charges, issue its complaint, and try the accused, and then prevent a reviewing court from receiving and considering the evidence of the smear campaign as a reason for disqualifying the bureau as biased and prejudiced."

Endorsed: In the United States Circuit Court of Appeals For the 7th Circuit Marquette Cement Manufacturing Company, Petitioner *vs.* Federal Trade Commission, Respondent No. 8371 Reply of Respondent to Response of Petitioner Marquette to Answer of Federal Trade Commission in Opposition to Petitioner's Motion to Adduce Additional Evidence. U. S. C. C. A.-7 Filed July 10 1944 Kenneth J. Carrick, Clerk W. T. Kelley, Chief Counsel for Federal Trade Commission.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 8371.

Marquette Cement Manufacturing Company,
Petitioner.

vs.

Federal Trade Commission,
Respondent.

RESPONDENT'S MOTION TO STRIKE CERTAIN PORTIONS OF PETITION FOR REVIEW; ALSO ANSWER TO MOTION OF PETITIONER TO SET DOWN THOSE PORTIONS OF PETITION FOR SPECIAL HEARING.

Come now counsel for the respondent Federal Trade Commission, and respectfully move the Court to strike from the petition for review filed by petitioner herein all portions thereof which seek the disqualification of the Commission by reason of its alleged bias or prejudgment.

As grounds for this motion counsel for the Commission adopt and incorporate by reference all statements contained in their answer filed on June 9, 1944 to petitioner's motion to adduce additional evidence and all statements contained in their reply filed July 10, 1944 to petitioner's response to said answer. Such grounds are three:

1. That petitioner did not act timely in making its motion before the Commission to recuse and was thereby estopped from making such motion.

2. The Commission in the issuance of the official publications on which petitioner relies acted strictly in accord with its statutory functions, duties, and powers.

3. That there was no bias or prejudgment of the issues of this case such as petitioner alleges to be embodied in such official publications.

The specific portions of the petition for review to which this motion to strike is directed are as follows:

> "As to the charge in the complaint that the Producers have by agreement used 'what is known as a Multiple Basing Point System of Pricing', the com-

plaint does not fully define the meaning and scope of the expression 'what is known as a Multiple Basing Point System of Pricing', but the Commission has, in various official publications issued by it, substantially described the term as a method or system of pricing which involves agreed-upon, limited-in-number 'basing points' and also agreed-upon so-called 'basing point prices' that are to be used by the industry in determining prices, such as the Commission has charged and asserted have been used in the steel industry." (p. 5)

"C. Marquette's Motion to Recuse

"15. Prior to the testimony and evidence being considered by the Commission, briefs were required to be filed by the various Producers charged with having entered into the combination or conspiracy to restrain prices. Marquette in its brief asserted that the Commission, before it had considered the recorded evidence, the report of the examiner upon the evidence and the briefs and arguments in the case, had misapprehended and reached erroneous conclusions as to the actual marketing and pricing methods in the cement industry and particularly as to the marketing and pricing methods used by Marquette, and that the Commission, therefore, approached the disposition of the case with a prejudiced viewpoint, having pre-judged the issues, and in support of this assertion Marquette set forth excerpts from certain publications of the Commission, published both before and after the beginning of the proceedings in this case.

"16. Before consideration of the recorded evidence, the Commission set a time for hearing the parties orally. Prior to Marquette's part in this oral proceeding, Marquette presented to the Commission a verified petition, motion and supporting affidavit to recuse the Commission from passing upon the issues. This petition charged, in substance: that the Commission is not a tribunal free from bias and prejudice, duly qualified to hear, try and pass upon the issues; that the Commission, prior to the consideration of the record and the evidence, had pre-judged the issues, as indicated by public and official utterances of the Commission and members thereof, some made and published prior to the filing of the complaint, others during

the taking of the testimony in the proceedings, and others subsequent thereto; that such pre-judgment of the issues indicated prejudice and bias against the entire portland cement industry generally and particularly as to the methods of pricing, marketing and distributing portland cement by the various Producers, including Marquette; that, therefore, Marquette and the cement industry generally could not receive a fair, impartial hearing of the issues in the proceeding before the Commission as then constituted.

"17. In support of this petition and motion, and for the purpose of showing the alleged prejudice and bias and the pre-judgment, Marquette presented with its petition and sought to put into evidence certain writings and publications of the Commission and members thereof, running from the year 1927 to and including 1941 and contained in twenty-three separate exhibits. These exhibits contained statements made by the Commission and members thereof of numerous charges, conclusions, opinions, and innuendoes relating to the alleged use by the cement Producers generally, including Marquette, of certain methods of pricing and marketing cement which then were substantially the same as certain previously condemned and prohibited methods of pricing and marketing which the Commission asserted had been and were being used in the steel industry and which were referred to in terms of opprobrium such as 'Pittsburgh Plus', 'Basing Point System', 'Multiple Basing Point System', 'Price Fixing,' etc. Such statements published before the Commission filed its Complaint were in substance that the marketing methods used in the cement industry were monopolistic, constituted 'price fixing' and were contrary to the anti-trust laws of the United States and in particular contrary to the Sherman Act.

"18. After the filing of this petition, the Commission on May 5, 1942, directed the respondent Marquette to proceed and announced that it would consider all motions made by Marquette at the time it considered the case on the merits." (pp. 7, 8, 9)

This motion is designed to be a countermotion to that of Petitioner Marquette which prays that there be set down for special hearing "that portion" of its petition for review relating to the alleged disqualification of the Commission and is filed primarily to insure a joinder of issue on that question.

This motion may also be taken as respondent's answer to such motion of petitioner and in the following respects:

In the event that the Court should be of the opinion that the contents of petitioner's motion to adduce additional evidence, the contents of the answer thereto filed by counsel for the Commission, the contents of petitioner's response and of the reply to such response are insufficient to enable the Court to pass upon the merits of said motion to adduce additional evidence, counsel for the Commission concur in the motion of petitioner's counsel to set down for special hearing "that portion" of Marquette's petition for review which relates to the alleged disqualification of the Commission. Counsel for the Commission request that such hearing, briefing and oral argument, if granted, also be upon the merits of this present motion and permit disposition thereof. They oppose, however, the suggestion made by petitioner that *aliundo* the terms of petitioner's motion that "all procedural matters relating to the merits should, in the meantime, be suspended until this controlling phase of the case is heard and disposed of." There would be no objection to suspension of the actual printing of the record but there should be no suspension of "all procedural matters".

Respectfully submitted,

Federal Trade Commission,
Respondent.

By: W. T. Kelley,
Chief Counsel.

Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.

Jul 10 1944. Kenneth Carrick, Clerk W. T. Kelley, Chief

Endorsed: In the United States Circuit Court of Appeals for the 7th Circuit Marquette Cement Manufacturing Company, Petitioner *vs.* Federal Trade Commission, Respondent No. 8371 Respondent's Motion to Strike Certain Portions of Petition for Review; Also Answer to Motion of Petitioner to Set Down Those Portions of Petition for Special Hearing. U. S. C. C. A-7 Filed July 10, 1944. Kenneth Carrick, Clerk, W. T. Kelley, Chief Counsel for Federal Trade Commission.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh District.

No. 8371.

Marquette Cement Manufacturing Company,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

RESPONSE OF PETITIONER, MARQUETTE CEMENT MANUFACTURING COMPANY, TO REPLY, ANSWER, AND MOTION TO STRIKE CERTAIN PORTIONS OF MARQUETTE'S PETITION TO REVIEW, OF RESPONDENT, FEDERAL TRADE COMMISSION.

The Reply of the Respondent, Commission, refers to certain alleged misstatements of fact appearing in Petitioner, Marquette's Response.

The Commission's Reply reaches its peroration in the following statement:

> "Thus, in five separate instances petitioner's counsel has flatly misstated the facts in his attempt to account for his failure to argue orally before the Commission the matter of his petition and motion to recuse."

The term "counsel", undoubtedly refers to the counsel who verified Marquette's Response. It is respectfully submitted that this is not the time and place to inject and try the issue of the veracity of counsel. All reference to this charge of deliberate falsification would be omitted herefrom except for two reasons:

(1) If this Court should now deem it material to further establish the truth of the verified statements made in Marquette's Response that:

> "The entire attempt of the Commission to suppress the evidence, which is relied upon by Marquette to prove the foregoing statements of fact, is of a piece with the action of counsel for the Commission in 1942, when made aware of Marquette's charges of disqualification of the Commission, in requesting Marquette's

> counsel not to make any mention of the charges in the oral argument before the Commission so as to avoid unpleasant publicity."

and that:

> "It is of a piece with the subsequent conduct of the Commission after counsel for Marquette, as a courtesy to the Commission, complied with the request of the Commission's counsel upon the condition only, that in order to be certain that in so doing he was waiving no right of Marquette, he would ask that the Commission give him assurance in the record, before Marquette's argument was presented, that any motion then filed by Marquette would be considered by the Commission in due course."

then in such event Marquette respectfully requests this Court to order and direct that Marquette may take the deposition,* on oral interrogatories, of W. T. Kelley, Washington, D. C., Chief Counsel for the Federal Trade Commission on May 5, 1942, who made the request that mention of the Motion to Recuse be omitted from Marquette's oral argument, and also of W. R. Englehardt of Chicago, Illinois, who was present on the occasion in question.

In this regard, counsel for Marquette respectfully directs the attention of the Court to the respondent, Commission's Motion to Strike certain portions of Marquette's Petition for Review which relate to the Marquette Motion to Disqualify the Commission for bias and prejudice and, more specifically, to the paragraphs numbered 1, 2 and 3 on Page 1 thereof, which purport to set forth the grounds of the said Motion to Strike, the first paragraph being:

> "1. That petitioner did not act timely in making its motion before the Commission to recuse and was thereby estopped from making such motion."

Since it appears that none of the grounds for the Motion to Strike bear upon the point that no mention of the Motion to Recuse was made in the oral argument presented on behalf of Marquette, it may be that the Commission now urges no such point. It may be that its accusation of misrepresentation of facts, and of false statements, made against counsel for Marquette is only by way of adding to the Commission's "straw man" issues heretofore raised or an attempt to adversely affect the point of law raised on behalf of Marquette by reviling

* See *Cupples Company, Mfrs.* v. *N. L. R. B.*, 103 F. (2d) 953, (C. C. A. 8, 1939).

Marquette's counsel. Unless this be substantially the situation, Marquette prays for leave to adduce additional evidence on the point, which was not heretofore done because it did not, for reasons herein made apparent, seem necessary.

(2) The second reason is that counsel for Marquette desires to correct the misapprehension which appears to exist in the minds of one or the other of the counsel for the Commission whose names are appended to the Commission's Reply. The statements made in Marquette's Response with reference to "the action of counsel for the Commission in 1942 when made aware of Marquette's charges of disqualification of the Commission" was not intended to refer to Mr. Wooden, Trial Counsel for the Commission. The phrase "counsel for the Commission" was used in the singular number in Marquette's Response and referred only to the "Chief Counsel" for the Commission. Misapprehension as to this fact is apparent in the third paragraph of the Commission's Reply in the following statement:

> "Counsel for the Commission emphatically and categorically deny that any such request was ever made by them of Marquette's counsel."

Marquette's counsel wishes to apologize of record for bringing about the misapprehension referred to and pleads in mitigation that it was assumed that since only the "Chief Counsel" and not the "Assistant Chief Counsel" was present at the time of the arrangement referred to, it would be clearly understood that the term "counsel for the Commission" used in Marquette's Response referred only to the "Chief Counsel" for the Commission.

The Commission's Reply concludes with no relief asked therein, but rather with a statement of the Commission's position on the point of disqualification to hear and decide this case, which is understood and treated as an introduction to the Commission's Motion to Strike the part of Marquette's Petition to Review relating to the Order of the Commission denying Marquette's Motion to Recuse.

The Reply states that the Commission is not "reluctant to meet any properly raised issue concerning its alleged disqualification" * * * and that they "welcome the opportunity to meet any such issue at any time the Court may seem fit." In the Commission's Motion to Strike it is set forth:

> "Counsel for the Commission concur in the motion

of petitioner's (Marquette) counsel to set down for special hearing 'that portion' of Marquette's petition for review which relates to the alleged disqualification of the Commission."

and request that such hearing, briefing and oral argument, if granted, also be upon the merits of the Commission's motion to strike. Counsel for Marquette consent to this suggestion made on behalf of the Commission, but further respectfully suggest that consideration be given to the several "grounds" set forth on the first page of the Commission's Motion to Strike in the paragraphs numbered 1, 2 and 3, respectively.

It is further respectfully suggested:

(a) That as to paragraphs numbers 1 and 2, that the Commission file its brief and argument on or before August 15, 1944, and that Marquette file its reply thereto on or before September 15, 1944, and that the Commission's response, if any, be filed on or before October 15, 1944;

(b) That as to paragraph number 3, Marquette file its brief in connection therewith on or before August 15, 1944, and that Commission file its reply thereto on or before September 15, 1944, and that Marquette's response, if any, be filed on or before October 15, 1944; and

(c) That the matter be set for oral argument as soon after October 15, 1944, as the Court may find convenient.

Respectfully submitted,

Edward A. Zimmerman,
H. W. Norman,
W. R. Engelhardt,
Attorneys for Petitioner,
Marquette Cement Manufacturing Company.

Roscoe Pound,
Of Counsel.

Endorsed: No. 8371 In the United States Circuit Court of Appeals for the Seventh Circuit Marquette Cement Manufacturing Company, Petitioner, *vs.* Federal Trade Commission, Respondent Response of Petitioner, Marquette Cement Manufacturing Company, to Reply, Answer and Motion to Strike Certain Portions of Marquette's Petition to Review, of Respondent, Federal Trade Commission U. S. C. C. A-7 Filed Jul 12 1944. Kenneth J. Carrick, Clerk.

And to-wit, on the 31st day of July, 1944, the following further proceedings were had and entered of record, to-wit:

July 31, 1944

8360, 8361, 8371, 8372, 8373,
8386, 8389, 8393, 8399, 8402,
8409, 8410.

(Caption)

Before:

Hon. Evan A. Evans, Circuit Judge,
Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.

Believing that the Court can not adequately understand the relevancy of the evidence and exhibits, it is ordered that the applications to adduce additional testimony be denied without prejudice to presenting similar requests at the time of the oral argument on the merits.

And to-wit, on the 31st day of July, 1944, the following further proceedings were had and entered of record, to-wit:

July 31, 1944

8371

(Caption)

Before:

Hon. Evan A. Evans, Circuit Judge,
Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.

It is ordered that the motion of respondent to strike from the petition for review filed by petitioner herein all portions thereof which seek the disqualification of the Commission by reason of its alleged bias or prejudgment, be denied without prejudice to the right to renew said motion at the time of the oral argument on the merits.

It is further ordered that the motion of petitioner to set for hearing petition to review and set aside order denying petition and motion to recuse the Federal Trade Commission be denied.

CLERK'S COPY.

Volume 25

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 23

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE CEMENT INSTITUTE, et al.

No. 24

FEDERAL TRADE COMMISSION, PETITIONER

vs.

AETNA PORTLAND CEMENT COMPANY, et al.

No. 25

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY

No. 26

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALAVERAS CEMENT COMPANY, et al.

No. 27

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HURON PORTLAND CEMENT COMPANY

No. 28

FEDERAL TRADE COMMISSION, PETITIONER

vs.

SUPERIOR PORTLAND CEMENT, INC.

No. 29

FEDERAL TRADE COMMISSION, PETITIONER

vs.

NORTHWESTERN PORTLAND CEMENT COMPANY

No. 30

FEDERAL TRADE COMMISSION, PETITIONER

vs.

RIVERSIDE CEMENT COMPANY

No. 31

FEDERAL TRADE COMMISSION, PETITIONER

vs.

UNIVERSAL ATLAS CEMENT COMPANY

No. 32

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALIFORNIA PORTLAND CEMENT COMPANY

No. 33

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MONOLITH PORTLAND CEMENT COMPANY, et al.

No. 34

FEDERAL TRADE COMMISSION, PETITIONER

vs.

ALPHA PORTLAND CEMENT COMPANY, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JANUARY 26, 1948

CERTIORARI GRANTED MARCH 29, 1948

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the fifth day of October, in the year of our Lord one thousand nine hundred and forty-two and of our Independence the one hundred and sixty-seventh.

No. 8360

AETNA PORTLAND CEMENT COMPANY ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 8361

THE CEMENT INSTITUTE ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION

No. 8371

MARQUETTE CEMENT MANUFACTURING COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 8372

CALAVERAS CEMENT COMPANY ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 8373

HURON PORTLAND CEMENT COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 8386

SUPERIOR PORTLAND CEMENT, INC., PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

725016—46——1